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**CONTESTED LEGALITIES IN COLONIAL MEXICO: FRANCISCO  
XAVIER GAMBOA AND THE DEFENSE OF DERECHO INDIANO**

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**by**

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# **CONTESTED LEGALITIES IN COLONIAL MEXICO: FRANCISCO XAVIER GAMBOA AND THE DEFENSE OF DERECHO INDIANO**

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“Contested Legalities in Colonial Mexico: Francisco Xavier Gamboa and the Defense of Derecho Indiano” explores the legal culture of late colonial Mexico through the lens of Francisco Xavier Gamboa, the most celebrated Mexican jurist of his era. Born in Guadalajara in 1717, Gamboa practiced in the courtrooms of Mexico City, represented the merchants guild of Mexico in Madrid from 1755 to 1764, analyzed mining legislation in the 1761 *Comentarios a las Ordenanzas de Minas*, and served three decades as an Audiencia judge until 1794. His long career encompassed the most salient features of the legal culture of late colonial Mexico.

The central argument of this dissertation is that the legality Gamboa embodied and defended, known to historians as *Derecho Indiano*, came under attack in the period of the so-called Bourbon Reforms during the reign of Charles III. Led by José de Gálvez, the visitor-general of New Spain in the 1760s and later the secretary of state for the Indies

from 1776 to 1787, the crown sought to streamline the legal order in order to root out corruption, restrict local autonomy, and strengthen royal authority. Gamboa and many other experienced officials opposed this effort. They argued that the old legal order, which recognized local customs and guaranteed judicial autonomy, provided the flexibility needed to maintain the Spanish empire in America. This contest in legalities marked the emergence of a centralized state in Spanish America and the moment when the Spanish legal order began to lose its legitimacy in America.

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## Introduction

If one day the literary and social history of Mexico is written, this person born at the beginning of the eighteenth century and dying at its end (June 4, 1794), seeing how much of it passed, will play a large role, because his epoch was great and he was great in it.<sup>1</sup>

*Mariano Otero, 1843*

When Mariano Otero wrote these words about Francisco Xavier Gamboa in 1843, Mexicans had forgotten the significance of Gamboa's role in the politics of the late colonial era. They had little interest in the eighteenth-century debates over law, political economy, and colonial governance in which Gamboa, the most accomplished jurist of his era, played a central part. Rather, Mexicans in the first decades after Independence were preoccupied with solving their country's pressing economic and political problems. They tended to see the colonial past as a burden on future prospects. Otero, a distinguished liberal lawyer, journalist, and political figure, born in 1817 in Guadalajara, the birthplace of Gamboa as well, wished to rescue the colonial jurist from historical oblivion.

To Otero, Gamboa exemplified the rich intellectual culture of his era. He was perhaps the brightest secular star of the Mexican Enlightenment. In particular, Otero admired Gamboa's sharp and logical legal writing, which stood in stark contrast to what Otero saw as the convoluted and verbose juridical literature of the colonial era. To restore Gamboa to the nation's memory, Otero planned a full biography. Unfortunately, when he went to the library of the cathedral of Mexico City, where Gamboa's papers had been

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<sup>1</sup> Mariano Otero, "Apuntes para la biografía de Don Francisco Javier Gamboa," in *Obras*, ed. Jesús Reyes Heróles (México, 1967), II, 461. The original: "Si un día se escribe la historia literaria y social de México, este personaje que nacido en principios del siglo XVIII, murió en su fin (4 de junio de 1794) viendo cuanto en él pasó, hará un gran papel, porque es una grande época la suya, y porque él fue también grande en ella."

deposited, he found nothing.<sup>2</sup> The papers had been removed by the government and never returned. Otero therefore neither had the material nor, it would turn out, the time to compose his book. He died in 1850 of cholera at the age of thirty-three.<sup>3</sup>

As Otero recognized, Gamboa's writings and career illuminates his age. His trajectory, from a Jesuit education to a thriving law practice to his long tenure on the Audiencia, or high court, of Mexico, offers a unique optic for the study of eighteenth-century New Spain, especially its legal culture. His most lasting achievement, the *Comentarios a las Ordenanzas de Minas*, a comprehensive analysis of the mining laws of New Spain published in Madrid in 1761, opens a window on the jurisprudence, social and economic thinking, and applied science of the Spanish world in the throes of the Enlightenment.<sup>4</sup> It was the only juridical work by a colonial Mexican translated into English, to serve as a working text for British miners in early nineteenth-century Mexico.<sup>5</sup> The *Comentarios* captured the richness of late colonial law, from its roots in Roman jurisprudence to its engagement with the emerging science of political economy. At the same time, Gamboa's presence on the Audiencia of Mexico, the senior court in Spanish America, from 1764 to 1794, gave him the opportunity to engage in the heated policy debates stirred up during the reign of Charles III.

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<sup>2</sup> Otero's abbreviated account of Gamboa appeared in Mexico's first encyclopedia, edited by Lucas Alamán. *Diccionario universal de historia y de geografía*, ed. Lucas Alamán, 7 vols. (México, 1853-55). Otero relied heavily on the eulogy to Gamboa composed shortly after his death by José Antonio de Alzate. See José Antonio de Alzate y Ramírez, "Elogio histórico del Señor D. Francisco Xavier de Gamboa, Regente que fue de esta Real Audiencia de México," in *Gacetas de literatura de México* (Puebla, 1831). Another important source was the bibliography of Gamboa compiled by José Beristáin. See José Mariano Beristáin y Souza, *Biblioteca hispano-americana septentrional*, 3 vols., vol. 2 (México, 1816-1821). It was Beristáin who saw Gamboa's papers in the cathedral library, presumably deposited there by Gamboa's son Juan José, a canon of the cathedral chapter.

<sup>3</sup> There are two biographies of Gamboa. Toribio Esquivel Obregón, *Biografía de Don Francisco Javier Gamboa, Ideario Político y Jurídico de Nueva España en el Siglo XVIII* (México, 1941); Elías Trabulse, *Francisco Xavier Gamboa: un político criollo en la Ilustración mexicana (1717-1794)* (México, 1985).

<sup>4</sup> Francisco Xavier de Gamboa, *Comentarios a las Ordenanzas de Minas* (Madrid, 1761).

<sup>5</sup> Francisco Javier de Gamboa, *Commentaries on the mining ordinances of Spain*, Richard Heathfield trans., 2 vols. (London, 1830).



The central argument of this dissertation is that the old legality of colonial Spanish America came under assault during the reign of Charles III. Inspired by a regalist conception of power, Caroline ministers, above all José de Gálvez, who served first as visitor-general of New Spain from 1765 to 1771 and then as the all-powerful secretary of state for the Indies from 1776 to 1787, targeted the pluralistic and decentralized legal order of Spanish America. The Caroline reformers thought that many of the legal customs, practices, attitudes, and institutions of New Spain and the other Spanish American territories impeded royal authority and engendered corruption.<sup>6</sup> They aspired to rationalize the legal order on the foundation of royal power. Improved transatlantic communications and surging confidence amongst reformers in Madrid that they possessed the answers to the empire's ills encouraged this centralization of legislative power. The campaign to reform law began in Spain itself, when the new Bourbon dynasty snuffed out the separate legal regimes of the old kingdoms of Aragon. It moved forcefully against ecclesiastical power in mid-century, as the crown asserted its rights of patronage over the church. After the Seven Years' War, the government of Charles III extended the fight to the Indies, as part of a larger program of colonial reform.

The movement to reform colonial legality was highly contested and never completed. It faced intense resistance from a wide circle of colonial judges and imperial officials. In New Spain, Gamboa was the most articulate and committed defender of the old legal order, termed *Derecho Indiano* by historians.<sup>7</sup> He continued to believe that the

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<sup>6</sup> The term Caroline better specifies the period of the implementation of the major reforms, under Charles III and the early years of Charles IV, and denotes the change in the emphasis of reform from the early Bourbon monarchs, Philip V and Ferdinand VI. I acknowledge John H. Elliott's use of the term in his recent study, J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830* (New Haven and London, 2006), 309.

<sup>7</sup> There is a vast historiography, almost exclusively in Spanish, on *Derecho Indiano*, focusing mainly on doctrine and institutions. Some of the most important scholars include Ricardo Levene, Mario Góngora, José Ots Capdequí, Alfonso García-Gallo, Alberto de la Hera, Ismael Sánchez Bella, and Antonio Dougnac Rodríguez. I have found the work of Victor Tau Anzoátegui particularly helpful in formulating my ideas about *Derecho Indiano*. See Víctor Tau Anzoátegui, *Casuismo y Sistema: Indagación histórica sobre el*

king in Madrid, no matter how enlightened and informed his ministers, could not monopolize legislative activity for the entire empire. America was too far away, strange, and unpredictable to deny local officials discretion in the interpretation and enforcement of law. Gamboa was comfortable with the casuistic orientation of traditional Spanish law, in which judges sought to find just solutions for each individual case, even if that meant sacrificing consistency and circumventing general rules. They could draw upon multiple normative sources beyond written law to base their decisions, such as Roman law, traditional uses and customs, and even Christian dogma.<sup>8</sup> What was important was remaining within the penumbra of *derecho*, understood as a synonym for justice, rather than mechanically applying the imperfect human rules embodied in *ley*.<sup>9</sup> In this way, colonial legality guaranteed a degree of flexibility that seemed to balance the need for local autonomy in a diverse empire with respect for the Spanish king's ultimate sovereignty.

For Gamboa, the main battleground in this contest over law was the jurisdiction of the Audiencia.<sup>10</sup> New Spain contained two high courts, in Mexico City and Guadalajara,

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*espíritu del Derecho Indiano* (Buenos Aires, 1992); Víctor Tau Anzoátegui, *La Ley en América Hispana del Descubrimiento a la Emancipación* (Buenos Aires, 1992); Víctor Tau Anzoátegui, *Nuevos Horizontes en el Estudio del Derecho Indiano* (Buenos Aires, 1997).

<sup>8</sup> In 1555 Charles V recognized the legitimacy of indigenous customary law for use in Spanish courts. Francisco Tomás y Valiente, *Manual de Historia del Derecho Español*, 4th ed. (Madrid, 1983), 341.

<sup>9</sup> The eighteenth-century *Diccionario de Autoridades* defines *derecho* as: "What nature dictates, what the Divinity commanded, what our Holy Mother Church defined, what the peoples constituted, what the Prince, the supreme legislator in his domains, establishes, or what the City or Town order for its internal government, or what custom introduces." The dictionary notes it was often used synonymously for justice. In contrast, *ley* has a much narrower meaning: "The rule and measure of what one can and cannot do ... It is also the establishment made by prudent men, for the reward and punishment of the actions of people, and for human government and commerce, in accordance with natural law [*derecho natural*] and reason." *Diccionario de Autoridades/Real Academia Española*, Edición Facsímil ed., 3 vols. (Madrid, 1990), D-Ñ: 79-80; 394.

<sup>10</sup> On the Audiencias see especially Eduardo Martiré, *Las Audiencias y la Administración de Justicia en las Indias* (Madrid, 2005); Teresa Sanciñena Asurmendi, *La Audiencia en México en el reinado de Carlos III* (México, 1999). American audiencias and the dates of their foundation: Santo Domingo 1511, Mexico 1527, Panama 1538, Guatemala 1543, Lima 1543, Guadalajara 1548, Bogotá 1548, Charcas 1559, Quito 1565, Manila 1583, Santiago de Chile 1609, Buenos Aires 1783, Caracas 1786, and Cuzco 1787.

the latter with responsibility over the northern part of the viceroyalty. Both courts exercised some direct jurisdiction over legal matters in their home cities and supervised the administration of justice by local royal officials, the *alcaldes mayores* and *corregidores* stationed in towns and rural districts. The Audiencia of Mexico, founded in 1527 as one of the first permanent Spanish institutions on the American mainland, was divided into two chambers, the *Sala de Crimen*, in which *alcaldes del crimen* handled penal cases, and the *Sala de lo Civil*, where *oidores* heard civil appeals. Audiencia magistrates also performed a variety of non-adjudicative duties, since judicial, legislative and political functions remained mixed under the old colonial regime. For instance, *alcaldes del crimen* helped police the streets of Mexico City and *oidores* ran government agencies, such as the office in charge of distributing mercury to silver miners. The most important extra-judicial duty was to act as an advisory council to the viceroy. He was obliged to seek the opinion of the *oidores*, meeting separately in a body called the *acuerdo*, on all important political questions. In this way, the Audiencia played a crucial role as a counterweight to the viceroy in civil government. It represented the king in matters of justice, just as the viceroy embodied the governmental aspect of the monarch's authority.

Gamboa energetically defended all aspects of the Audiencia's traditional jurisdiction, especially its primary authority over the administration of justice. The crown under Charles III supported a number of specialized tribunals in New Spain exempt from the audiencia's purview, notably the Acordada police force and the Mining Tribunal. These bodies were more amenable to royal control than the fiercely independent Audiencia. Gamboa and his colleagues on the bench naturally protested their loss of authority, claiming that the fragmentation of the Audiencia's jurisdiction over civil law matters imperiled the administration of justice in New Spain. The new tribunals did not

follow the elaborate procedures that protected the legal rights of individuals. They were not staffed by lawyers or supervised by judges. Underlying the Audiencia's concern for justice was the tangible loss of its income from the curtailment of some of its traditional powers, for instance over criminal sentencing. The reduction in the power of the Audiencia, therefore, tracked the Caroline assault on the old legality of New Spain.

This dissertation builds on a small but stimulating historiography dedicated to a more careful historicization of Spanish law in the Indies.<sup>11</sup> This effort begins with a rejection of what Argentine legal historian Victor Tau Anzoátegui referred to as “a suffocating and imperious statism and legalism that atrophies the vision of the past.”<sup>12</sup> Historians have too often assumed the existence of a colonial state and a centralized legislative apparatus.<sup>13</sup> Law is thereby equated with the written orders, decrees, ordinances and *pragmáticas* issued by the crown. Since such law was never systematically enforced in America, historians have concluded that Spanish law was formalistic, without great moral force, and alien to everyday lives.<sup>14</sup> This view of law,

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<sup>11</sup> Some of the principal works of this historiography include Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700-1810* (Albuquerque, 1995); Tamar Herzog, *Upholding Justice: Society, State, and the Penal System in Quito (1650-1750)* (Ann Arbor, 2004); Susan Kellogg, *Law and the Transformation of Aztec Culture, 1500-1700* (Norman, 1995); Brian P. Owensby, *Empire of Law and Indian Justice in Colonial Mexico* (Stanford, 2008); Tau Anzoátegui, *Nuevos horizontes*. See also a number of earlier works that focused on colonial legality: Woodrow Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real* (Berkeley, 1983); Mario Góngora, *Studies in the Colonial History of Spanish America*, Richard Southern trans. (Cambridge, 1975); Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia, 1949); Louisa S. Hoberman, "Hispanic American Political Theory as a Distinct Tradition," *Journal of the History of Ideas* 41 (1980); John Leddy Phelan, "Authority and Flexibility in the Spanish Imperial Bureaucracy," *Administrative Science Quarterly* 5 (June, 1960); Steve J. Stern, *Peru's Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640* (Madison, 1982).

<sup>12</sup> Tau Anzoátegui, *Nuevos horizontes*, 21.

<sup>13</sup> For a recent work that “dismantles” the colonial state see Alejandro Cañeque, *The King's Living Image: The Culture and Politics of Viceregal Power in Colonial Mexico* (New York, 2004). See also Brian Owensby's discussion of the anachronism of the English “rule of law” concept applied to law in Latin America. Owensby, *Empire of Law*, 5-6.

<sup>14</sup> Respected historians who have characterized law in this way include Charles Gibson, *Spain in America* (New York, 1966), 109; Stanley J. Stein and Barbara H. Stein, *The Colonial Heritage of Latin America: Essays on Economic Dependence in Perspective* (New York, 1970), 81.

however, is anachronistic and narrow. Prior to the emergence of modern states exercising a monopoly over the creation of law, the written law of the king was just one of several source of legal norms. As Lauren Benton demonstrates in her ambitious study of global legal regimes, *Law and Colonial Cultures*, early modern legality was characteristically open-ended and pluralistic.<sup>15</sup> It embraced, beside the written rules laid down by the king, canon law, common law and indigenous custom. It was a volatile mix but succeeded in imposing juridical order in the absence of states with effective enforcement power.

Unlike the old Spanish-language historiography of *Derecho Indiano*, focused on doctrine and institutions, this new legal historiography situates law in its social context.<sup>16</sup> Here is where historians of the law have made their most significant contributions to our understanding of colonial Spanish America. Law did matter in ordinary colonial lives. Tamar Herzog, in her study of the administration of criminal justice in colonial Quito, has shown how much the entire community participated in legal processes.<sup>17</sup> Social historians Ann Twinam and Bianca Premo have established the consequential impact of legal status in the domestic sphere.<sup>18</sup> A number of scholars, beginning with Woodrow Borah in his study of the General Indian Court of New Spain, have demonstrated how indigenous peoples assimilated Spanish law.<sup>19</sup> Indians used it as a shield, to protect their bodies,

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<sup>15</sup> See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, U.K., 2002).

<sup>16</sup> This type of legal history derives from the pioneering work of the American legal historian James Willard Hurst and the English social historian E.P. Thompson. See James Willard Hurst, *Law and Economic Growth: the Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, Mass., 1964); E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York, 1975). See also Douglas Hay, *Albion's Fatal Tree: Crime and Society in Eighteenth-century England* (New York, 1975).

<sup>17</sup> Tamar Herzog, *La administración como un fenómeno social: la justicia penal de la ciudad de Quito, 1650-1750* (Madrid, 1995); Herzog, *Upholding Justice*.

<sup>18</sup> Bianca Premo, *Children of the Father King: Youth, Authority, & Legal Minority in Colonial Lima* (Chapel Hill, 2005); Ann Twinam, *Public Lives, Private Secrets: Gender, Honor, Sexuality, and Illegitimacy in Colonial Spanish America* (Stanford, 1999).

<sup>19</sup> Borah, *Justice by Insurance*; Owensby, *Empire of Law*; Sergio Serulnikov, *Subverting Colonial Authority: Challenges to Spanish Rule in Eighteenth-Century Southern Andes* (Durham and London, 2003); Stern, *Peru's Indian Peoples*. Even African slaves used Spanish law to press their claims. See María Elena

land, and liberty against Spanish and creole exploitation, and as a sword to advance their own claims, often against fellow natives. As Brian Owensby shows, the Indians of seventeenth-century Mexico took the promise of royal justice seriously: "Through their active engagement with the law they glimpsed justice. And by pursuing justice, they created an enduring politics of colonial lives."<sup>20</sup> In using the court system, Indians gave legitimacy to Spanish law and colonial government. In this sense, colonial Spanish law performed much like English law in the same period, winning the consent of the lower orders by offering hope of redress.<sup>21</sup> Historians have now made real progress in overturning the old picture of colonial Spanish law as dysfunctional, especially in comparison with the exaggerated merits of English law.

This dissertation scrutinizes several facets of the little known world of legal culture in colonial Spanish America.<sup>22</sup> Legal culture is a broad concept but not without analytical force. It encompasses both social facts about the law, such as legal education, the role of lawyers, and the power of judges, and more general attitudes and ideas about the law, held by insiders and outsiders alike. The American legal sociologist Lawrence Friedman referred to it as *living law*, to distinguish it from the rules and institutions that form the dry bones of the legal system.<sup>23</sup> By focusing on the career of Gamboa, from law

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Díaz, *The Virgin, the King, and the Royal Slaves of El Cobre: Negotiating Freedom in Colonial Cuba, 1670-1780* (Stanford, 2000).

<sup>20</sup> Owensby, *Empire of Law*, 1.

<sup>21</sup> Thompson, *Whigs and Hunters: The Origins of the Black Act*. See also Benton's discussion of the comparison between colonial legal regimes and the English law in producing consent among the lower orders of society. Benton, *Law and Colonial Cultures*, 253-265.

<sup>22</sup> On legal culture in colonial Mexico and colonial Spanish America more generally see Javier Barrientos Grandón, *La cultura jurídica en la Nueva España* (México, 1993); Francisco De Icaza Dufour, *La abogacía en el Reino de Nueva España 1521-1821* (México, 1998); Miguel Luque Talaván, *Un universo de opiniones: La literatura jurídica indiana* (Madrid, 2003).

<sup>23</sup> Lawrence M. Friedman, "The Concept of Legal Culture: A Reply," in *Comparing Legal Cultures*, ed. David Nelken (Aldershot, UK, 1997), 34; Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York, 1975); Lawrence M. Friedman and Harry N. Scheiber, "Legal Culture and the Legal Profession: An Introduction," in *Legal Culture and the Legal Profession*, ed. Lawrence M. Friedman and Harry N. Scheiber (Boulder, CO, 1996).

student to senior judge, I provide an inside perspective of this culture. This is important because the attitudes and experiences of legal personnel like Gamboa, crucial agents in the colonial system, explain the response within the royal bureaucracy to the sharp-edged reforms launched by Caroline ministers. Legal culture acted as a filter between the conceptualization of policy and its implementation.

This dissertation takes a biographical approach.<sup>24</sup> I use Gamboa's career as a lens to survey the terrain of legal culture, social networks, administrative reform, and political economy. He was an emblematic figure and protagonist in the most important debates about law and reform in New Spain in the second half of the eighteenth century.

Chapter one, *The Education of a Lawyer, 1717-1740*, lays down the foundation for the examination of legal culture. Gamboa received an excellent though not unrepresentative education for elite lawyers in the Spanish world. He studied with the Jesuits at San Juan Bautista in Guadalajara and San Ildefonso in Mexico City. The latter was perhaps the finest school in Spanish America in the eighteenth century and arguably in the Western Hemisphere. The Jesuits imparted a classical education, based on the mastery of Latin and the reading of the literature of ancient Rome and Greece. They emphasized logic, rhetoric, philosophy and mathematics, the ideal preparation for the study of law. Gamboa attended the University of Mexico, the oldest university in America, where he studied civil and canon law according to the curriculum established in medieval Italy. The focus of the study was Roman law. Regalists in Spain were already grumbling about this curriculum, claiming it ignored Spanish royal legislation. Gamboa and law students of his generation throughout the Spanish world were inculcated in a

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<sup>24</sup> Biography may be gaining renewed respect among academic historians, especially as a way to bridge the gap between social history and linguistic-turn cultural history. See the recent discussion David Nasaw et al., "AHR Roundtable: Historians and Biography," *American Historical Review* 114 (June 2009).

very conservative yet cosmopolitan legal culture, rooted in Roman jurisprudence but common to all of continental Europe and Latin America.

Chapter two, *The Private Lawyer in New Spain, 1740-1755*, probes the next layer of legal culture, forensic practice. Gamboa became a private lawyer instead of seeking an academic or administrative post. He gained expertise in both mining law and estates, representing a wide range of clients in lawsuits before the Audiencia of Mexico. This chapter examines several of his documented cases, to illustrate both the nature of civil litigation in the eighteenth century and some of the experiences that shaped his views on law. His court experience taught him the importance of equitable as well as legal arguments: judges often overlooked legal rules if they believed justice would be better served in the particular case. He also witnessed the problems that arose when litigants played jurisdictional politics and ignored rulings by the Audiencia. It is not difficult to see how he became a fierce defender of the jurisdiction of the Audiencia.

Chapter three, *Gamboa and the Basque Atlantic, 1745-1764*, situates Gamboa the lawyer in society. As the son of Basque immigrants, he joined as a young man the religious brotherhood of Nuestra Señora de Aránzazu, the social, religious and philanthropic center of the Basque community in New Spain. Aránzazu anchored a transatlantic network, built on family trading companies, patronage networks, and shared culture. The religious brotherhood overlapped with the consulado of Mexico, sharing leaders and members. Gamboa became the lawyer for the confraternity and the consulado. He represented Aránzazu in its long struggle to open a school for girls exempt from church jurisdiction and went to Madrid in 1755 to lobby on behalf of the merchants.

This chapter argues that through the Basques Gamboa gained a greater appreciation for the importance of local autonomy. From the fueros of the Basque country to the plan to open a lay-controlled school, the Basque community jealously



guarded its independence. They argued they could be trusted with self-government because of their tested loyalty to the larger entity, whether it was the church or the monarchy. This type of thinking comes through in both Gamboa's legal and economic ideas.

*Gamboa and the Basque Atlantic* also challenges the conventional historiography on mercantile power in late colonial Mexico. The peninsula-born merchants of the consulado, whose economic interests Gamboa faithfully served, were not the colonial robber barons historians have portrayed, protecting their own privileges at the expense of society as a whole.<sup>25</sup> Rather, I argue, there was a natural alignment in what they wanted and what New Spain needed. Their monopoly on trade helped to maintain the money supply in an economy whose main export, silver, was also its currency. The Basque merchants of the consulado saw it in their own interest to promote the self-sufficiency of the Mexican economy. Gamboa's much-maligned plan to establish a mining bank under consulado control would further this interest. In fact, the crown rejected the idea after Pedro Rodríguez Campomanes, one of Charles III's most important advisors on economic matters, pointed out that, if successful, the bank would give New Spain too much autonomy. Gamboa, a proud creole as well as a transatlantic Basque, supportive of greater freedom for New Spain within the Spanish monarchy, saw no conflict in advancing the agenda of the Basque merchants and the consulado they dominated.

The fourth chapter, *The Comentarios a las Ordenanzas de Minas and the New Legality*, analyzes Gamboa's legal thinking as expressed in his encyclopedic commentary on the Mining Ordinances of 1584. It examines the circumstances of its composition in late 1750s Madrid, just as Charles III came to the throne and the European campaign

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<sup>25</sup> D. A. Brading, *Miners and Merchants in Bourbon Mexico, 1763-1810* (Cambridge, 1971), 162; Stanley J. Stein and Barbara H. Stein, *Apogee of Empire: Spain and New Spain in the Age of Charles III, 1759-1789* (Baltimore, 2003), 229.

against the Jesuits reached the Iberian Peninsula. Gamboa's commentary combined the old with the new, especially a keen appreciation of the latest technical advances in mining and metallurgy with an embrace of the old and complicated legal order of the Indies. Although a practical book for miners, Gamboa endorsed between the lines the existing legal order. Through Gamboa's analysis of mining law, the chapter outlines the basic features of Derecho Indiano. It then presents the new regalist legality, which José de Gálvez introduced to New Spain in 1765 when he began the visita.

Chapter five, *Security and Justice: New Spain in the 1760s*, analyzes a pair of controversies over criminal law that illustrate the clash of legal visions in the early years of the visita. Gamboa returned to New Spain in 1764 to begin his service to the crown as an alcalde del crimen, a criminal court judge, on the Audiencia of Mexico. He defended the jurisdiction of the Audiencia as a lawyer, both in the briefs he wrote for clients in the 1740s and 1750s and in the *Comentarios*. As an Audiencia judge he was at the center of the conflict. He defended the court's customary prerogatives over policing and sentencing, against the efforts by the viceroy, the marqués de Croix, backed by Gálvez, to limit the Audiencia's power in the name of better public security. These controversies, especially over the sentencing of criminals, revealed the material interests at stake in the contest over legalities. They also show how an atmosphere of crisis and insecurity hastened the advance of regalist legality. Gamboa himself paid a high price for his resistance to the viceroy and visitor-general. They forced him out of New Spain in 1769 as a political danger.

Chapter six, *Mexican Silver and the Contest of Legalities, 1761-1790*, pulls together many strands of the overall process of legal change and Caroline reform. The chapter surveys the intersection between legality and political economy in the context of mining reform. Gamboa's *Comentarios* set the terms of the debate, diagnosing the legal

and economic problems of the industry. His economic thinking flowed naturally from his legal ideas. He defended the silver mines of Mexico against those Spanish critics who blamed American precious metals for Spain's economic decline. The principal reason the crown should promote mining, Gamboa argued, was to encourage economic development in New Spain. This was in Spain's best interest as it would stimulate transatlantic trade and increase fiscal revenues, without the need to levy new or more onerous taxes. Gamboa and other opponents of the Caroline reform program headed by Gálvez did not deny the legitimacy of the crown's desire for greater fiscal income from New Spain; they just believed it could be achieved under the old regime, without disruptive institutional changes. He recommended a set of measures that built on the existing legal and financial structures of the industry.

Gálvez agreed with Gamboa that government support for mining was imperative. Yet he saw it as an opportunity to introduce a radical transformation of the economic and legal framework of the industry. The Mining Tribunal he promoted exemplified the Caroline approach to reform. It stripped the Audiencia of jurisdiction over mining, bestowing it in a specialized body beholden to the crown. It was achieved over the objections not just of Gamboa and other officials within New Spain but also those of experienced crown ministers in Spain, notably the contador-general of the Council of the Indies, Tomás Ortiz de Landázuri. This alliance of opponents demonstrated several rarely acknowledged aspects of the Caroline reform process: the consistent failure to heed local advice, the irrelevance of the creole-peninsular split in determining attitudes towards reform, and the importance of legal culture as a medium between articulation and enforcement. In the case of the Mining Tribunal, the experienced local experts were right. The Mining Tribunal collapsed within a decade of its creation. Gamboa, whose 1761 *Comentarios* launched the mining reform process, participated in its denouement. The

collapse of the Tribunal in 1786, the death of Gálvez in 1787, and the appointment of Gamboa as *regente*, or chief justice, of the audiencia of Mexico, symbolized the survival of the old legal order.

Over twenty years ago, William B. Taylor urged historians of early Latin America to reconnect social history to systems of power.<sup>26</sup> He offered several incisive suggestions on how to accomplish this goal. Historians should conceive of institutions and communities not as abstractions but as bundles of relationships waiting to be untangled by careful historical research. One way to undertake this challenge was to focus on power brokers, such as priests and magistrates, who mediated between local society and the larger circuits of power.<sup>27</sup> He particularly recommended a fresh look at colonial law, without the distorting lens of legalism. This dissertation strives to follow Taylor's still pertinent agenda.

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<sup>26</sup> William B. Taylor, "Between Global Process and Local Knowledge: An Inquiry into Early Latin American Social History, 1500-1900," in *Reliving the Past: The Worlds of Social History*, ed. Olivier Zunz (Chapel Hill, 1985).

<sup>27</sup> He took up the challenge of studying parish priests himself. William B. Taylor, *Magistrates of the Sacred: Priests and Parishioners in Eighteenth-Century Mexico* (Stanford, 1996).

## Chapter One: The Education of a Lawyer, 1717-1740

That having passed to Higher Studies he was a member of the College of San Ildefonso for six years, during which time he took seven courses in both laws at the University, leaving accredited with the reputation as the premier Student of his time.<sup>28</sup>

Gamboa's *Relación de méritos*, 1757

### Introduction

In his *relación de méritos*, his official curriculum vitae filed with the government, Gamboa fashioned a compelling narrative of his rise from poverty-stricken orphan on the streets of Guadalajara to become one of the most honored *letrados* of eighteenth-century Mexico City. His success, he suggested, derived primarily from his determination to salvage his family's good name and fortune after the sudden death of his father. According to his résumé, this motivation and his natural talent propelled him to the top of his class, at both his Jesuit primary and secondary schools and the law faculty of the University of Mexico. He also acknowledged the generous assistance of José Mesía de la Cerda, a Spanish-born oidor on the Audiencia of Guadalajara, who paid for his education. After graduation, he quickly gained fame for his brilliant representations on behalf of clients, winning the confidence of the richest men and most powerful officials in New Spain. There was little room for modesty in official service records. The whole point was to convince the crown of one's suitability for an official post. Gamboa hoped in the late 1750s, when he submitted his *relación de méritos*, that the Spanish government would "confer on him one of the places on those Audiencias" in America.

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<sup>28</sup> AGI, Indiferente General, 159, "Relación de servicios, 1759." He filed an identical *Relación de méritos* in 1757. AGI, Indiferente General, 157, "Relación de méritos," 1757.

Despite the exceptional accomplishments listed in his résumé, Gamboa's early life conformed in many ways to common eighteenth-century patterns. High mortality meant that many children lost a parent, just as adults routinely endured the deaths of infant offspring. Gamboa's contemporary, Pedro Rodríguez Campomanes, the ideologue of Caroline reform and an acerbic critic of the old legal order, experienced a remarkably similar youth, losing his father young and forced to depend on benefactors to fund his education.<sup>29</sup> Even Gamboa's move as a teenager from Guadalajara to Mexico City in the company of Mesía de la Cerda replicated in miniature the immigration experience of many young Spaniards, especially the Basques sent to New Spain under the care of an older relative or trusted family friend.<sup>30</sup> While he was a stellar student at San Ildefonso, a Jesuit education was common for elite Spanish males, in New Spain as in the old country. Furthermore, his legal studies at the University of Mexico, based on the Roman law encoded by the emperor Justinian in the sixth century, tied him to European jurists from across the centuries.

The purpose of this chapter is to explore the education of a lawyer in eighteenth-century Mexico, following the path of Gamboa through his Jesuit colleges in Guadalajara and Mexico City and the law faculty of the University of Mexico. It was a highly conservative but sophisticated education, the foundation of the legal culture of not just New Spain but continental Europe as a whole. Under the Jesuits, who espoused the cause of Renaissance humanism in their classrooms, he mastered Latin and read the ancient classics. He developed strong skills in memorization, argumentation, and rhetoric, which served him well throughout his career. He acquired a grounding in mathematics and

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<sup>29</sup> Vicente Llombart Rosa, *Campomanes: economista y político de Carlos III* (Madrid, 1992), 30-34.

<sup>30</sup> Gamboa himself escorted several young Basques to New Spain in 1764, when he returned after his decade in Madrid as the deputy of the consulado, including a relative of his friend Ambrosio de Meave. AGI, Contratación, no. 1, r. 8, 1764.

natural science. He also met the future leaders of the church and government of New Spain at San Ildefonso. They were proud creoles yet equally loyal subjects of the Spanish king. At the University of Mexico, his legal studies centered on the *Corpus Juris Civilis* of Justinian in civil law and the medieval laws of the papacy in canon law. He was assimilated into a cohesive legal culture, which had long honored jurists as indispensable guardians of the legal order.

### **A Jesuit education in eighteenth-century Mexico**

Gamboa was born on December 17, 1717 in Guadalajara in Nueva Galicia, now the Mexican state of Jalisco, one of eight children of Antonio de Gamboa and María de la Puente y Arámburu. Gamboa described his parents as “old Christians of known nobility, pure of all bad blood.”<sup>31</sup> His parents were of Basque descent, his father most likely an immigrant who established himself in Guadalajara as a merchant. Antonio de Gamboa, however, died sometime in the mid-1720s. According to Gamboa’s nineteenth-century biographer Mariano Otero, unscrupulous executors dissipated the estate, leaving the family destitute.<sup>32</sup> The young Gamboa was forced to beg from door to door to support his mother and younger siblings.<sup>33</sup> His determination to better himself and help his family caught the eye of José Mesía de la Cerda, an oidor, or civil court judge, recently installed on the Audiencia of Guadalajara.<sup>34</sup> Mesía offered to pay for the boy’s education, first at

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<sup>31</sup> "Relación de servicios, 1759." The original: “Christianos viejos de conocida nobleza, y limpios de toda mala raza.”

<sup>32</sup> Otero, "Apuntes para la biografía de Don Francisco Javier Gamboa," 441.

<sup>33</sup> In the words of the 1759 Relación de servicios: “...emprehendió de edad de ocho años la carrera de sus Estudios con tal esmero, que estudiaba por la calle, y colectaba en varias casas limosna para su sustento...”

<sup>34</sup> Mark A. Burkholder, *Biographical Dictionary of Councillors of the Indies, 1717-1808* (Westport, Connecticut, 1986), 212. Born in Jaén in 1696, Mesía came from a distinguished Andalusian family. He had studied civil and canon law at the University of Granada and obtained in 1724 a crown appointment to New Spain’s second Audiencia. The family also produced Pedro Mesía de la Cerda, a naval commander and reformist viceroy of New Granada in the 1760s. See Beatriz Castro Carvajal and Daniel García-Peña Jaramillo, *Gran Enciclopedia de Colombia*, 11 vols., vol. 10 (Bogotá, 1994), 385-386.

the Jesuit college of San Juan Bautista in Guadalajara. When the crown transferred Mesía to the Sala de Crimen of the Audiencia of Mexico in 1733, he brought the teenage Gamboa with him and enrolled him as a boarder at the Jesuit college of San Ildefonso in the capital.

Mesía de la Cerda was a devotee of the Jesuits. He had studied at their college of San Bartolomé y Santiago in Granada and maintained strong ties to the order in New Spain. The Jesuits singled him out for praise at a poetry contest held at San Ildefonso in 1748 on the occasion of the coronation of Fernando VI. He won a prize for the best Latin epigram and the priests treated him as an honorary alumnus of San Ildefonso: “The extraordinary love with which he favors and protects his college forms affectionate bonds, which tie the hearts of its members to his obedience.”<sup>35</sup> Mesía helped instill in Gamboa the same respect for the Society of Jesus. He also provided Gamboa with a model to emulate. Like his patron, Gamboa chose to study law and aspired to win an Audiencia appointment one day.

A Jesuit education in the eighteenth century meant an immersion in classic literature. Renaissance humanism inspired the plan of studies, the *Ratio Studiorum*, adopted by the order in 1599.<sup>36</sup> Students began by mastering Latin. They then progressed through courses of Grammar, Humanities and Rhetoric, exposed along the way to the

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<sup>35</sup> Colegio de San Ildefonso, *Cifra feliz de las dichas imponderables, que se promete la monarchia hespañola baxo el suspirado dominio de su augusto soberano el Señor D. Fernando VI (que Dios prospere). Deduxose del senario, que le pertenece en el orden chronologico de los Señores reyes de este nombre. Y sirvió de assumpto a la lid ingeniosa, justa literaria, certamen poetico, con que la humilde lealtad, y reconocida gratitud del real, y mas antiguo Colégio de S. Ildephonso de México, seminario de la Compañía de Jesus, celebró el día 23. de enero del año de 1748. la exaltacion al solio de su augustissimo protector. Sacalo a luz el mismo real, y mas antiguo colégio ...* (Salamanca, 1748), 53. Osore, presumably misled by the words praising Mesía de la Cerda in the published account of the poetry contest, counted him as both a former student of San Ildefonso and a native of Mexico. See Félix de Osore, *Noticias bibliograficas de alumnos distinguidos del Colegio de San Pedro, San Pablo y San Ildefonso de Mexico*, ed. Genero García, 2 vols., Documentos para la Historia de México (México, 1908), II, 84-85.

<sup>36</sup> See Pilar Gonzalbo, *Historia de la educacion en la Epoca Colonial. La Educacion de los criollos y la vida urbana* (México, 1990); Elisa Luque Alcaide, *La educación en Nueva España en el siglo XVIII* (Seville, 1970), 146.



great works of Roman and Greek writers. Next came Philosophy, a university preparatory course that included mathematics and science. Gamboa completed all of these stages of his education at San Juan Bautista in Guadalajara.<sup>37</sup> The Jesuits taught using the scholastic method, premised on the notion that through rigorous argumentation one could arrive at the truth. To argue well, students needed to combine well-honed rhetorical skills with prodigious feats of memory. Gamboa's résumé recorded that he performed with notable distinction in Grammar and Rhetoric. His teachers declared him the best student in his class in Philosophy. Gamboa was eligible, upon his arrival in Mexico City in 1733, to present the examinations at the University of Mexico for his Bachelor of Arts degree. He graduated on January 8, 1734, just after his sixteenth birthday.<sup>38</sup>

Gamboa arrived at a propitious moment in the history of San Ildefonso. Founded in the late-sixteenth century and under royal patronage since 1612, San Ildefonso enjoyed unprecedented prosperity during Gamboa's university years.<sup>39</sup> With the Mexican economy in full swing, the Jesuits had the resources to embark on an ambitious building program.<sup>40</sup> The imposing three-storey building still covering an entire block in Mexico City's historic center was largely completed during Gamboa's time at San Ildefonso.<sup>41</sup> It allowed the expansion of the student body to three hundred students, from little boys studying Latin to doctoral candidates at the University.

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<sup>37</sup> For the college of San Juan Bautista en Guadalajara see Pilar Gonzalbo, *La educación popular de los jesuitas* (México, 1989), 35.

<sup>38</sup> "Relación de servicios, 1759."

<sup>39</sup> José Rojas Garcidueñas, *El antiguo Colegio de San Ildefonso*, 2 ed. (México, 1985), 13-15. Formally, the two Jesuit colleges of San Ildefonso and San Pedro y San Pablo remained distinct, with San Ildefonso the residential college and San Pedro y San Pablo the teaching facility. In effect, their identities had merged by the eighteenth century.

<sup>40</sup> Ibid., 59. The wealth of the Jesuits was conspicuous enough in the 1730s for archbishop Vizarrón to launch an investigation into alleged evasion of taxes on their rural estates. It was apparently resolved, however, without incident. See Gonzalbo, *Historia de Educación: los criollos*, 231.

<sup>41</sup> Osoreo estimated the total cost of four hundred thousand pesos. Félix de Osoreo, *Historia de todos los colegios de la Ciudad de México desde la Conquista hasta 1780* (México, 1929), 76.

The driving force behind the construction was Fr. Cristóbal Escobar y Llamas (1692-1760), a gifted administrator who served as rector for sixteen years, from 1727 to 1742, and then the Provincial of the Jesuit order in New Spain from 1743 to 1747.<sup>42</sup> In the celebratory prose of Osores in his *Noticias bio-bibliográficas de alumnos distinguidos*:

He was the most distinguished protector and promoter of the letters in the cited Seminary, whose grandiose and magnificent building he raised from the foundations, adorning Mexico with it, and providing with it an idea of the magnificence corresponding to the dignity of an empire of the sciences.<sup>43</sup>

While the new building was his most lasting achievement, the rector also expanded the college's academic program. He established new prizes in jurisprudence and theology, awarded each year to the best students in the disciplines.<sup>44</sup> Gamboa won the jurisprudence prize after his third and fourth years. The rector also raised funds in the late 1730s to endow two chairs at the University, to be held by San Ildefonso members, one dedicated to the study of the Sentences of Peter Lombard, a fundamental text of canon law, and the other to Francisco Suárez, the great sixteenth-century Jesuit theologian and legal scholar.<sup>45</sup>

The Jesuits expected their students at San Ildefonso to follow strict rules of behavior. In 1719, a handful of students created a disturbance outside the apartment door of the rector, Fr. Ignacio Cochet.<sup>46</sup> In apparent response to this discipline problem, the

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<sup>42</sup> José Gutiérrez Casillas, *Diccionario Bio-Bibliográfico de la Compañía de Jesús en México*, 16 vols., vol. XV (México, 1977), 563-582.

<sup>43</sup> Osores, *Noticias bio-bibliográficas*, I, 199. The original: "Fue el más insigne protector y promovedor de las letras en el citado Seminario, cuyo grandioso y magnifico edificio levantó desde cimientos, adornando con él a México, y dando en esto una idea de la magnificencia correspondiente a la dignidad de un imperio de las ciencias." The average tenure of a rector was two to four years, compared to Escobar's almost sixteen years in the rector's chair.

<sup>44</sup> Osores, *Historia de todos los colegios*, 76.

<sup>45</sup> Alberto María Carreño, *Efemerides de la Real y Pontificia Universidad de Mexico, segun sus libros de claustros* (México, 1963), 359-360; Gonzalbo, *Historia de Educación: los criollos*, 106; Luque Alcaide, *Educación en Nueva España*, 113-120.

<sup>46</sup> Gutiérrez Casillas, *Diccionario Bio-Bibliográfico de la Compañía de Jesús en México*, 500-505.

college republished in 1722 a little guidebook for its students, *El discreto estudiante, Reglas de buena crianza, para la educación de los colegiales del Colegio Real de San Ildefonso*, written by Jesuit Diego de Acevedo in the early seventeenth century.<sup>47</sup> The guide admonished students to act respectfully and modestly. For instance, in church you should “keep your body composed, the eyes modest and serious, walking slowly, remembering to show courtesy to the persons you pass.”<sup>48</sup> If the church were “adorned and decorated, do not spend much time in looking at it, because that is silliness, and you will be judged as a man who has never seen such a thing before.”<sup>49</sup> The well-behaved student would, naturally, obey his elders faithfully. Amongst his peers, he would not brag, gossip, repeat ridiculous nicknames, or use the familiar addresses of *vos* or *tu*. He would keep his hair short and his nails clipped. At the table he would only use his right hand to cut his meat so not to be mistaken for a glutton. In short, *El discreto estudiante* insisted above all on the importance of maintaining a grave demeanor, appropriate advice for the future priests and lawyers of New Spain.

The Jesuits’ commitment to classical learning did not prevent them from introducing into Catholic countries new scientific ideas, especially those of a practical nature. This was not always easy to pull off, since the order remained officially dedicated to Aristotle in philosophy and Aquinas in theology.<sup>50</sup> Jesuit scholars tried, in typical scholastic fashion, to square seemingly irreconcilable differences, such as those between Aristotle’s and Newton’s cosmographies. If the new ideas offended traditional Catholic dogma, such as some of the propositions advanced by Galileo and Descartes – products

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<sup>47</sup> *El discreto estudiante reglas de buena crianza, para la educacion de los colegiales del Colegio real de S. Ildefonso, a cuyas expensas se reimprime*, (México, 1722). On Acevedo see Martín Ramos Díaz, “Idólatras y mentores. Escuelas en el Yucatán del siglo XVI,” *Estudios de historia novohispana* 28: 22.

<sup>48</sup> *El discreto estudiante*, unpaginated.

<sup>49</sup> *Ibid.*

<sup>50</sup> Mordechai Feingold, “Preface,” in *Jesuit Science and the Republic of Letters*, ed. Mordechai Feingold (Cambridge, MA, 2003), viii.

of Jesuit education – teachers discussed them openly in order to refute them. Presented even in a negative light, innovative ideas received a hearing in Jesuit colleges.<sup>51</sup>

In mathematics Jesuit scholars particularly excelled. In Madrid, the Colegio Imperial became a renowned center of mathematics in the seventeenth century, drawing scholars like the Scot Hugh Sempill (ca. 1590-1654) and José de Zaragoza (1627-1679).<sup>52</sup> Sempill and Zaragoza both wrote mathematical texts that were widely used throughout the Catholic world. Before arriving in Madrid, Zaragoza had taught at the Jesuit college in Valencia, helping to nurture that Mediterranean city as a seedbed of the Spanish Enlightenment. He taught Tomás Vicente Tosca (1651-1723), who in turn hosted a tertulia frequented by the young Gregorio Mayans i Sísar, a leading intellectual in eighteenth-century Spain.<sup>53</sup> Tosca's nine-volume *Compendio mathematico*, published between 1707 and 1715 and well known to Gamboa and other students of Jesuit colleges of the era, covered the full range of applied mathematics, from geometry and trigonometry to astronomy and architecture. Tosca also sought to reconcile the findings of experimental science with traditional scholastic philosophy in his five-volume *Compendio philosophicum*, published in 1721. The eclecticism of Tosca, embracing the methodology and findings of experimental science on the one hand while holding steadfast to Catholic dogma on the other, typified the Spanish response to the new ideas of the Enlightenment.<sup>54</sup> Historians have tended to dwell on the absurdity of this attempted synthesis, without appreciating how it facilitated the diffusion of potentially heterodox

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<sup>51</sup> María de la Paz Ramos Lara, *Difusión e institucionalización de la mecánica newtoniana en México en el siglo XVIII* (México, 1994), 48-53; Francisco Sánchez-Blanco, *Europa y el pensamiento español del siglo XVIII* (Madrid, 1991), 40-41.

<sup>52</sup> See Víctor Navarro, "Tradition and Scientific Change in Early Modern Spain: The Role of the Jesuits," in *Jesuit Science and the Republic of Letters*, ed. Mordechai Feingold (Cambridge, MA, 2003), 331-387.

<sup>53</sup> *Ibid.*, 355-358.

<sup>54</sup> *Ibid.*, 354-357; Sánchez-Blanco, *Europa y el pensamiento español del siglo XVIII*, 108-114.

ideas in an overtly Catholic society.<sup>55</sup> Gamboa, at the very least, received at San Ildefonso the new thinking about natural philosophy. According to his first biographer, José Antonio de Alzate, Gamboa “dedicated himself to all the sciences with equal ardor and looked for new knowledge in them to illuminate his understanding.”<sup>56</sup> Even his legal thinking, with its crisp logic, bore the stamp of his penchant for the scientific approach, in the opinion of Otero.<sup>57</sup>

San Ildefonso also introduced the bright student from Guadalajara to many of the future church, secular and intellectual leaders of New Spain. Gamboa met José Miguel Calixto de Berrio y Zaldívar, later the marqués de Jaral de Berrio and conde de San Mateo Valparaíso, one of New Spain’s most important landowners. They became intimate friends and *compadres*, with Gamboa acting as the executor of Berrio’s estate in the 1780s.<sup>58</sup> Gamboa’s school days overlapped with many future ecclesiastical leaders in New Spain, including José Rafael Campoy, praised by Osoreo as “the wisest of the wise in the eighteenth century.”<sup>59</sup> Campoy came to San Ildefonso a year after Gamboa in 1735 and left in 1741 to enter the Jesuit seminary at Tepozotlán.<sup>60</sup> He later taught at

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<sup>55</sup> Feingold, "Jesuit Science," ii-xi.

<sup>56</sup> Alzate y Ramírez, "Elogio histórico del Señor D. Francisco Xavier de Gamboa, Regente que fue de esta Real Audiencia de México."

<sup>57</sup> Otero, "Apuntes para la biografía de Don Francisco Javier Gamboa," 455.

<sup>58</sup> Berrio shared Gamboa’s interest in books, acquiring an impressive library, as well as a collection of scientific instruments, housed in his magnificent residence in Mexico City, now a museum. See Maria del Carmen Reyna, "La biblioteca de José Miguel Calixto de Berrio y Zaldívar, segundo conde de San Mateo de Valparaíso y primer marqués del Jaral de Berrio," in *Un recorrido por archivos y bibliotecas privados* (México, 1997). When Berrio died in 1781, Gamboa served as executor. The establishment of a *mayorazgo* (entailed estate) gave rise to an acrimonious dispute as the deceased’s daughter and son-in-law, the marqués de Moncada, challenged Gamboa’s disposition of the property. For Gamboa’s pained reaction to the allegations made by the Moncadas that he had enriched himself see AGI, Mexico, 1879, "Gamboa to Flores," April 16, 1788.

<sup>59</sup> Osoreo, *Noticias bio-bibliográficas*, I, 129.

<sup>60</sup> Juan Luis Maneiro and Manuel Fabri, *Vidas de mexicanos ilustres del siglo XVIII* ed. Bernabé Navarro (México, 1989), 3-48. According to Maneiro and Fabri, Campoy rebelled in 1737 against his strict master of Philosophy, Fr. Miguel Quijano, and fled San Ildefonso. He headed north out of the city, disguised as a country boy. He was found a few weeks later working as a servant for a widow, whose severity put even

Tepozotlán and the Jesuit college of Veracruz, mentoring several of the more famous Mexican Jesuits from the next generation, namely the poet Diego José Abad, the theologian Francisco Xavier Alegre, and the historian and educational reformer Francisco Xavier Clavijero.<sup>61</sup> Gamboa shared the honor with Cayetano Torres Tuñón, the leading theology student of his generation at San Ildefonso, with presenting learned disquisitions on the occasion of the inauguration in December 1739 of the college's refurbished chapel and general assembly hall.<sup>62</sup> Torres went on to serve in the cathedral chapter of Mexico City and reportedly put his large family fortune at the service of the exiled Mexican Jesuits in Italy.<sup>63</sup>

The Jesuits of San Ildefonso also turned out much of the future legal talent of New Spain. Gamboa studied under former collegian Agustín Bechi y Monterde, a Veracruz-born priest, canon law professor, and Audiencia advocate. Manuel Ignacio Beye de Cisneros, another canon law professor and rector of the University in the late 1750s and early 1760s, attended class with Gamboa.<sup>64</sup> Baltasar Ladrón de Guevara, who succeeded Gamboa as regent of the Audiencia in 1794, entered San Ildefonso just as Gamboa was graduating. In 1760 Bechi, Beye, and Ladrón founded the *Ilustre y Real*

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Quijano in a good light. Escobar fetched the boy and put him under the care of a more gentle Philosophy professor, José Avilés.

<sup>61</sup> Luque Alcaide, *Educación en Nueva España*, 22-33.

<sup>62</sup> The sources differ on the date of this function. Gamboa notes in his *Relación de méritos* that he was chosen to give the Latin panegyric at the feast day of the Immaculate Conception in December 1739. He doesn't mention the inauguration of the new public spaces at San Ildefonso. However, the chronicler Mariano Veytia noted in the 1770s, based on a contemporary Jesuit chronicle of San Ildefonso, that the inauguration of the new rooms took place in December 1739 with the participation of Gamboa and Torres Tuñón. Benson Latin American Collection, Austin, Mariano Fernández de Echeverría y Veytia Collection, [16--]-1886, "Manuscripts, G-12."

<sup>63</sup> See Osoreo, *Noticias bio-bibliográficas*, II, 256; Luis Ignacio Sáinz, "Un retrato olvidado del Salón General de Actos del Colegio de San Ildefonso: Don Cayetano Antonio Torres Tuñón en el pincel de Andrés López," *Casa del Tiempo* IX (May, 2002).

<sup>64</sup> Osoreo, *Noticias bio-bibliográficas*, I, 101-106.

*Colegio de Abogados* in Mexico City, a mutual aid association for lawyers.<sup>65</sup> Gamboa, in Madrid representing the consulado, assisted his friends by preparing the petition to the crown for approval of the new organization.<sup>66</sup>

Gamboa was living at San Ildefonso when a typhoid epidemic ravaged central New Spain in late 1736 and early 1737. Tens of thousands reportedly died in Mexico City, their bodies insalubriously buried in the cathedral and parish churches or burned at the paupers' cemetery of San Lázaro.<sup>67</sup> The disease, called *matlazahuatl* by the natives, hit the poor and Indian quarters of the city most ferociously. The college of San Ildefonso was relatively safe, and the Jesuits, along with the rest of New Spain's secular and regular clergy, toiled hard to quell the contagion. Besides administering to the sick, they organized public processions of New Spain's holiest images and relics, among them Our Lady of Los Remedios and the Christ of Ixmiquilpan. The appeal to the heavens culminated on May 24, 1737, with a massive public demonstration of devotion to the Virgin of Guadalupe, celebrating her election as the patron of the city. It marked the apotheosis of the cult of Guadalupe. The rains arrived soon thereafter, putting an end to the plague. Her apparent effectiveness prompted other cities and towns to follow Mexico City's lead and elevate her as their protectress. In 1746, New Spain as a whole enshrined Guadalupe as its universal patron.<sup>68</sup>

The elevation of Guadalupe both symbolized and stimulated creole pride. The community of San Ildefonso was at the center of this movement. Provoked by a derisive

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<sup>65</sup> Alejandro Mayagoitia, "Los rectores del Ilustre y Real Colegio de Abogados de México: la primera generación (1760-1783)," in *Carrera, linaje y patronazgo: Clérigos y juristas en nueva España, Chile y Perú (siglos XVI-XVIII)*, ed. Rodolfo Aguirre Salvador (México, 2004), 283-302.

<sup>66</sup> AGI, Mexico, 1702, "Gamboa to crown, s/f, 1760," 1760.

<sup>67</sup> D. A. Brading, *Mexican Phoenix, Our Lady of Guadalupe: Image and Tradition Across Five Centuries* (Cambridge, 2001), 120.

<sup>68</sup> D. A. Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867* (Cambridge, 1991), 347.

remark about the intellectual barrenness of America by Manuel Martí, the widely-read Spanish classicist known as the Dean of Alicante, collegian Juan José Eguiara y Eguren set out in the late 1740s to document the achievements of American men and women of letters in his *Bibliotheca Mexicana*, an ambitious bio-bibliography of Spanish American authors written, somewhat incongruously, in Latin. In it, he praised, for instance, both Sor Juana Inés de la Cruz and Carlos de Sigüenza y Góngora, two late seventeenth-century savants whose memory still lingered in the early-eighteenth century. Like Sigüenza, who presented the Aztecs as exemplars of political virtue in his design for a processional arch in 1680, Eguiara attempted to link the grandeur of pre-Columbian civilization to contemporary novohispano culture.<sup>69</sup> He had studied at San Ildefonso in the 1710s and later taught there, as well as holding chairs in philosophy and theology at the University. He probably met Gamboa in the 1730s and certainly in the 1740s when they both belonged to the Basque confraternity of Nuestra Señora de Aránzazu.<sup>70</sup>

Devotion to Guadalupe and pride in New Spain in no way conflicted with the bonds of loyalty the alumni of San Ildefonso felt to the crown. Graduates of the college saw themselves as an elite, the natural candidates to staff the ecclesiastical and secular administrations of New Spain. They were the equivalent of Spain's *colegiales*, those aristocratic members of the most prestigious colleges at Spanish universities groomed for senior posts in the court and church. Yet, just as the *colegiales* were increasingly challenged for positions of power by the *manteístas*, the humbler graduates of newer Spanish universities, the alumni of San Ildefonso too felt competition from outsiders in the second half of the eighteenth century. The crown increasingly favored peninsula-born

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<sup>69</sup> Ernesto De la Torre Villar, "Estudio introductorio," in *Juan José de Eguiara y Eguren, Historia de Sabios Novohispanos*, ed. Ernesto De la Torre Villar (México, 1998); Elisa Luque Alcaide, *La Cofradía de Aránzazu de México (1681-1799)* (Pamplona, 1995), 388-390. On Sigüenza's arch, see Cañeque, *The King's Living Image*, 29-30.

<sup>70</sup> See Luque Alcaide, *Aránzazu de México*.



officials in New Spain, provoking creole protests, such as the famous 1771 representation by the Mexico City council.<sup>71</sup>

### Studying Law at the University of Mexico

Gamboa divided his time as a student between San Ildefonso, where he lived and participated in its social, religious and academic rituals, and the University of Mexico, where he attended the required courses on law.<sup>72</sup> The university, founded in the 1550s on the model of the University of Salamanca, was located a short walk to the south of the college, on the other side of the main square. There he received a classical legal education, based on a curriculum little changed in five hundred years.<sup>73</sup> Students studied the *ius commune*, the common law of Europe, made up of Roman law and medieval canon law. In civil law, students studied the *Corpus Juris Civilis*, the compilation of Roman law formed under the emperor Justinian in the sixth century. It consisted of several parts: the Codex and the Novels, containing actual Roman legislation; the Digest, a collection of commentaries by Roman jurists; and the Institutes, a didactic work for law students excerpting the Codex and the Digest. The study of the Digest formed the core of the civil law curriculum.<sup>74</sup> For canon law, students read the *Corpus Juris Canonici*, an omnibus produced by the Council of Trent in 1582. It included the main parts of such important medieval compilations as the *Decretum* of Gratian, the *Decretals* of Pope

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<sup>71</sup> BRP, Mis. de Ayala, II/2828, "Representación vindicatoria que en el año de 1771 hizo a S. M. la ciudad de México... contra la sinrazón de un Ministro o Prelado de aquellas partes que [...] informó no ser a propósito por su espíritu sumido y abatido para empleos de alta gerarquía [...] : recopila los héroes que ha habido en aquellas regiones en ciencias y armas y lamenta el abandono con que la preocupacion de los europeos los ha despojado contra la inclinacion piadosa del Rey," May 2, 1771. See also Salvador Bernabeu Albert, *El criollo como voluntad y representación* (Madrid, 2006).

<sup>72</sup> Teaching was split between the colleges and the universities, with San Ildefonso acting somewhat more independently than the other *colegios mayores*. Luque Alcaide, *Educación en Nueva España*, 33.

<sup>73</sup> John Henry Merryman, *The Civil Law Tradition*, 2 ed. (Stanford, 1985), 6-13.

<sup>74</sup> Rogelio Pérez-Perdomo, *Latin American Lawyers: A Historical Introduction* (Stanford, California, 2006), 6.

Gregory IX, and the *Clementines* of Pope Clement V. The primary task of law professors was to read and explain to their students these classic texts, including the glosses and commentaries on them produced by later generations of European jurists. Students memorized long passages in Latin and discussed thorny issues of law in public acts.<sup>75</sup>

Roman law provided the basis of legal education because it represented the foundation of the European legal order and an enduring embodiment of legal wisdom, an approximation in some jurists' minds of natural law itself. Castile embraced Roman law in a unique way, codifying it in the *Siete Partidas*, an enormous, multi-volumed work produced under Alfonso X in the thirteenth century.<sup>76</sup> The *Partidas* covered general legal principles and canon law in its first part, government and administration in the second, procedure and property in the third, domestic relations in the fourth, obligations and maritime law in the fifth, succession in the sixth, and criminal law in the seventh. One of the most popular legal texts in colonial Spanish America was a 1555 edition of the *Partidas* annotated by the Spanish jurist Gregorio López.<sup>77</sup> To be sure, Roman law, even the *Partidas*, technically a Castilian royal statute, was only enforceable in limited circumstances. According to the *Ordenamiento de Alcalá* in 1348, the *Partidas* served as supplementary law, after royal and municipal legislation. Yet there was a lot to supplement, as royal law remained silent on most private law and procedural matters.

Throughout the eighteenth century, legal reformers and ministers under the Bourbon throne criticized the legal curriculum based on Roman law on regalist grounds.

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<sup>75</sup> Barrientos Grandón, *Cultura Jurídica*, 38, 124-128; Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, 1983), 120-132; Lucio Mendieta y Núñez, *Historia de la Facultad de Derecho*, 2 ed. (México, 1975), 115-120; Pérez-Perdomo, *Latin American Lawyers*, 6-7; Tomás y Valiente, *Derecho Español*, 199-200.

<sup>76</sup> Robert I. Burns, ed., *Las Siete Partidas* (Philadelphia, 2001).

<sup>77</sup> Luque Talaván, *Universo de opiniones*, 133; Tomás y Valiente, *Derecho Español*, 312.

They wanted students to pay more attention to Spanish legislation.<sup>78</sup> The study of Roman law, they thought, detracted from the respect lawyers and judges owed the laws of their own country.<sup>79</sup> Furthermore, it endowed jurists with excessive power. Because legal scholars had to constantly reinterpret Roman law to suit contemporary conditions, they acquired the habit of putting all law under the magnifying glass, even the decrees and statutes issued by the king. On several occasions the crown specifically ordered Spanish universities to broaden the curriculum to include Castilian legislation.<sup>80</sup> In 1741 the Council of Castile wrote to all Spanish universities urging “the endowed chairs and professors in both laws to take care in reading with the Roman law the laws of the Kingdom that correspond to the subjects under consideration.”<sup>81</sup> Although the Bourbons began to push this issue almost as soon as they consolidated their hold on the throne, there is no evidence that it altered legal education in New Spain in the 1730s.

It was an exaggeration, in any case, for the reformers to claim students received no exposure to national law. The study of royal law, such as the *Recopilación de las leyes de los reinos de Indias*, the authoritative collection for Spanish America published in

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<sup>78</sup> Francisco Sánchez-Blanco, *El Absolutismo y las Luces en el reinado de Carlos III* (Madrid, 2002), 113-119, 194-222; Tomás y Valiente, *Derecho Español*, 37-39, 194-222.

<sup>79</sup> Tomás y Valiente, *Derecho Español*, 240-243.

<sup>80</sup> *Ibid.*, 389-390.

<sup>81</sup> Quoted in Santos M. Coronas González, *Manual de Historia del Derecho Español* (Valencia, 1996), 402. The relevant section of the letter read in full: “En diferentes tiempos, i en especial desde el año de 1713. se ha tratado, assi por ordenes de su Mag. como del Consejo, en razon de que en las Escuelas de las Universidades mayores de España, i tambien en las menores, en lugar del Derecho de los Romanos, se restabliesse la lectura, i explicación de las leyes Reales, assignando Cathedras, en que precisamente se uviesse de dictar el Derecho Patrio, pues por él, i no por el de los Romanos deven substanciarse, i juzgarse los pleitos; i considerando el Consejo la suma utilidad, que producirá a la juventud aplicada al estudio de los Canones, i Leyes, se dicte, i explique tambien, sin faltar al Estatuto, i assignación en sus Cathedras los que las regentaron, el Derecho Real, exponiendo las leyes Patrias pertenecientes al titulo, materia, u paragrafo de la lectura diaria, tanto las concordantes, como las contrarias, modificativas, u derogatorias; ha resuelto ahora que los Cathedraticos, i profesores en ambos Derecho tengan cuidado de leer con el derecho de los Romanos las leyes del Reino, correspondientes a la materia, que explicaren; lo que se haga saber a todos los profesores, i explicantes de extraordinario, juntando el Claustro a este fin, i remitiendo Testimonio de ello.”

1680, could easily be incorporated into discussions about principles of Roman law.<sup>82</sup> Likewise, professors would discourse with their students on juridical works that focused on royal law, such as Juan de Solórzano y Pereira's groundbreaking *De Indiarum Jure et Gubernatione* of 1629 and *Política Indiana* of 1647, which described for the first time the legal order of Spanish America as a distinct system.<sup>83</sup> Law students in Mexico would also have the opportunity to discuss contemporary legislation during extracurricular sessions on jurisprudence, such as the weekly meetings held at San Ildefonso during Gamboa's time in the college. The only time they would be examined on national law, however, was when they attended the compulsory preparatory classes for admission to the bar of the Audiencia, held at San Ildefonso.<sup>84</sup>

Gamboa blazed an impressive path through the faculty of law of the University of Mexico. According to his résumé, he was acknowledged as the "the best student of his time." He won college scholarships as the best law student after his third and fourth years, as well as an honorary university chair in canon law, the *Vísperas de Canones*. In May 1738 he received his bachelor of canon law, after a typically arduous defense requiring a series of oral recitals of points of law. Shortly thereafter he received his licentiate or degree in civil law. He capped his years at San Ildefonso in December 1739, reciting the Latin panegyric, at the request of the rector Escobar, before the whole faculty of the college during the solemn feast of the Immaculate Conception. He then took the Audiencia course for prospective lawyers, winning admission to the bar on November 28, 1740.

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<sup>82</sup> Mendieta y Núñez, *Historia de la Facultad de Derecho*, 115-118.

<sup>83</sup> Javier Malagón Barceló and José María Ots y Capdequí, *Solórzano y la Política indiana*, [1. ed. (México, 1965)]; Juan Solórzano Pereyra, *Política Indiana*, ed. Francisco Tomás y Valiente and Ana María Barrero, 3 vols. (Madrid, 1996). On Solórzano in the classrooms of the University of Mexico in the 1730s see Esquivel Obregón, *Biografía de Don Francisco Javier Gamboa*, 44-45.

<sup>84</sup> Mendieta y Núñez, *Historia de la Facultad de Derecho*, 120.

## Conclusion

Francisco Xavier Gamboa, a poor boy from a good family in Guadalajara, received an excellent education in early-eighteenth century New Spain, mostly at the hands of Jesuit priests. It was guided by two long established curricula, the *Ratio Studiorum* of the Jesuits, based on the classical liberal arts, and the plan of law studies first pioneered in Bologna in the eleventh century. He mastered Latin, acquired a fluency in classical and juridical literature, and developed the persuasive skills needed to succeed as a lawyer. He also felt the winds of the Enlightenment through the Jesuit teaching of practical science and mathematics and their elaborate refutations of dangerous philosophical notions. Gamboa may have excelled above other students but most lawyers in eighteenth century Spain and Mexico would have received a similar education. This made for a cohesive legal culture, conscious of the Roman roots of Spanish legality.

This education fostered complementary loyalties. Gamboa studied at San Ildefonso, famous for its creole pride. In fact, he resided at the college when devotion to the Virgin of Guadalupe, the icon of the New World, reached its peak in the wake of the late 1730s typhoid epidemic. Yet at the same time the atmosphere was hardly parochial. San Ildefonso was part of a global constellation of Jesuit colleges that transmitted ideas and information across imperial borders and oceans. Its graduates expected to take their places in high offices of the Spanish church and monarchy. They identified as much with the Spanish crown as their Mexican homeland. Gamboa emerged ready to do battle, for the causes he took on for pay as a lawyer or those he embraced as a loyal Mexican subject of the king.

## Chapter Two: The Private Lawyer in New Spain, 1740-1755

Gamboa, courtrooms and Parnassus  
For you the same I judge;  
Here you resemble Papinius;  
There a cultured Papinian.

Of the buckles that you wear  
To cinch your buskin,  
Do not fear the spur,  
For that is your sharpest talent.<sup>85</sup>

*Inscription on prize awarded Gamboa for poetry, San Ildefonso, 1748*

### Introduction

Gamboa boasted in his résumé that he had “gained such credit as an astute, eloquent and wise Jurisconsult that in recent time hardly could there be an important matter in which one party did not benefit from [my] prudence.”<sup>86</sup> Even discounting for the positive spin, Gamboa enjoyed a successful law practice in the 1740s and 1750s. He represented miners, merchants, religious orders, prisoners of the Inquisition, and even a wayward Franciscan friar, José Torrubia, one of Spain’s first paleontologists.<sup>87</sup> He

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<sup>85</sup> Ildefonso, *Cifra feliz de las dichas imponderables, que se promete la monarchia hespañola baxo el suspirado dominio de su augusto soberano el Señor D. Fernando VI (que Dios prospere). Deduxose del senario, que le pertenece en el orden chronologico de los Señores reyes de este nombre. Y sirvió de assumpto a la lid ingeniosa, justa literaria, certamen poetico, con que la humilde lealtad, y reconocida gratitud del real, y mas antiguo Colégio de S. Ildephonso de México, seminario de la Compañia de Jesus, celebró el dia 23. de enero del año de 1748. la exaltacion al solio de su augustissimo protector. Sacalo a luz el mismo real, y mas antiguo colégio ...* 75. Gamboa received as a prize in a 1748 poetry contest held at San Ildefonso a set of polished silver buckles. The inscription read: “Gamboa, Estrados, y Parnasso / Para ti lo mismo juzgo; Aquí Papinio pareces; Allá Papiniano culto. De las hevillas que llevas / Para ceñir tu cothurno, No temas el aguijón, Que es tu ingenio mas agudo.” Papinius was a first-century Roman poet and Papinian a celebrated Roman jurist of the second century.

<sup>86</sup> “Relación de servicios, 1759.” The original: “...por lo que ha ganado el credito de sagaz, eloquente, y sabio Jurisconsulto; tanto, que en estos ultimos tiempos apenas se havrá contenido negocio importante en que no haya tenido alguna parte su prudencia.”

<sup>87</sup> The Franciscans imprisoned Torrubia in Havana for dereliction of duty for hunting for fossils in America rather than saving souls in the Philippines. Gamboa helped him return to Spain where he wrote in 1754 the

provided legal advice to viceroys, the metropolitan cathedral, the consulado, and district officials facing complex legal questions. He wrote legal briefs interpreting statutory law, the doctrines of the *ius commune*, and even the *patronato*, the Spanish king's patronage power over the Catholic Church.

Dramatic courtroom battles were not a feature of eighteenth-century civil litigation in New Spain. Parties submitted written pleadings, including notarized witness depositions. Legal representatives, whether lawyers like Gamboa or court *procuradores*, occasionally made oral arguments but did not examine or cross-examine witnesses in court. They did not face juries. When handling a case, Gamboa spent the majority of his time in his library, preparing briefs that addressed questions of fact and law. Books mattered, as "the main part of the craft and skill consists in looking at and handling many and diverse books," as Melchor Cabrera Núñez de Guzmán noted in his 1683 work, *Idea de un abogado perfecto, reducido a práctica*.<sup>88</sup> Judges determined cases on voluminous written records but did not issue reasons for their decision. In fact, the law prohibited the publication of the courts' opinions. This was consistent with the casuistic nature of adjudication; since judges were not bound to follow precedents, as under English common law, there was no need to publish decisions. The surviving documentary evidence of civil lawsuits consists mostly of lawyers' briefs and witness testimonies.

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*Aparato para la historia natural española*, in which he tried to reconcile the fossil record with the Great Flood described in Genesis. On the friendship with Gamboa see Eugenio Maffei and Ramón Rua Figueroa, *Apuntes para una biblioteca española de libros, folletos y artículos, impresos y manuscritos, relativos al conocimiento y exploración de las riquezas minerales y a las ciencias auxiliares*, 2 vols., vol. 2 (Madrid, 1873), 407. For the brief Gamboa filed on his behalf see BN Mexico, Fondo Reservado, Colección Archivo Franciscano, 61/1201.1, "Memorial del licenciado Francisco Javier de Gamboa [dirigido al virrey Francisco de Güemez y Horcasitas, I conde de Revilla Gigedo] en el que se defiende a fray José Torrubia, secretario general de las provincias de Nueva España, preso en el real fuerza del Morro de la Habana, a petición del provincial de San Gregorio de Filipinas, con el pretexto de que no acató la orden de pasar a Filipinas para dar cuenta de los gastos de una misión que llevó a la mencionada provincia," 1748.

<sup>88</sup> Quoted in Tau Anzoátegui, *Nuevos horizontes*, 71.

This chapter examines a cross-section of Gamboa's cases, to show the breadth of his legal experience and the concrete situations that gave rise to his legal, economic and political ideas. Then as now, lawyers perfected their craft through practice. They learned that in the real world more can turn on small points of procedure than the grand theories studied in law school. It was through his fifteen years of private practice in Mexico City that Gamboa acquired the deep legal and economic knowledge displayed in the pages of the *Comentarios a las Ordenanzas de Minas*. This knowledge gave him added credibility as an Audiencia magistrate. No other judge during his time had comparable experience. Most appointees, especially Spanish-born, came from academic posts, with little practical experience before taking their seats on the bench.

Extracting a lawyer's personal opinions from the arguments he made on behalf of clients is perilous. His duty is to represent his client, not advance his own ideas. Nonetheless, it is possible to discern in his cases positions Gamboa would embrace later in the *Comentarios* and in his career on the bench. In the mining cases, he discovered the importance of respecting the jurisdiction of the Audiencia, in order to provide determinacy in the resolution of disputes. He saw first-hand how the failure to obey the rulings of the Audiencia prolonged lawsuits, wasted fortunes, and provoked street battles. Viceroys should help enforce Audiencia rulings, not interfere in particular cases before the court. At the same time, however, he defended the power of viceroys to intervene in ecclesiastical matters. This was consistent with the tradition of royal patronage over the church. Gamboa shared the regalism of Ferdinand VI and his chief minister, the marqués de la Ensenada, which was directed against the church; he rejected the more aggressive form popular amongst the ministers of Charles III, who wielded royal power against other secular institutions, such as the proudly independent courts of law.



## Entering private practice

Gamboa left the sheltered world of San Ildefonso in 1740 to join the law office of José Méndez Meléndez. Young lawyers usually clerked for an established *letrado* for several years before earning the license to practice before the *audiencia*. Méndez managed an important and diverse practice. He served as the official legal advisor for a viceroy, Juan de Acuña, the marquis of Casafuerte (1722-34).<sup>89</sup> He represented religious organizations, notably the Carmelites, and advised the tribunal of the consulado, where all commercial disputes were heard.

Before Méndez could provide much mentoring to Gamboa, however, he dropped dead of a heart attack on March 5, 1742 at the age of sixty-one.<sup>90</sup> Gamboa wrote in his résumé that he immediately took over the case Méndez had been conducting and made “such an effective defense that it received the applause of the tribunal and justice for the interested party.”<sup>91</sup> He claimed that through this defense he retained all of his mentor’s distinguished clients and began his career “where other lawyers finish.” Again, discounting for the rhetorical flourishes, the sudden death of Méndez certainly gave Gamboa an unexpected opportunity to establish himself at the beginning of his career.

Gamboa defended his decision to enter private practice. As an exceptional student at the University of Mexico, he might have followed the example of his teacher Bechi y Monterde and completed a doctorate in civil or canon law. He could have pursued a university career or, if so inclined, taken vows and entered the church as a canonist.<sup>92</sup> Most young men who studied law hoped to secure an honorable perch in the secular or

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<sup>89</sup> Osorio, *Historia de todos los colegios*, 23.

<sup>90</sup> Juan Francisco Sahagún de Arévalo Ladrón de Guevara, Juan Ignacio de Castorena y Ursúa, and Francisco González de Cossío, *Gacetas de Mexico: Castorena y Ursúa (1722) - Sahagún de Arévalo (1728 a 1742)*, 3 vols., vol. 3, Testimonios mexicanos, historiadores, 4-6 (México, 1949), 230.

<sup>91</sup> “Relación de servicios, 1759.”

<sup>92</sup> Rodolfo Aguirre Salvador, *El mérito y la estrategia: Clérigos, juristas y médicos en Nueva España* (México, 2003), 82.

ecclesiastical administration rather than plunge into the hurly-burly of forensic practice.<sup>93</sup> Gamboa chose the more arduous side of the business, however, because it offered the best chance to restore his family's fortune. He felt the need to alleviate the suffering of his "household, Mother, and siblings."<sup>94</sup> Gamboa's law practice brought him material success. He indulged his love of books, amassing by the mid-1750s "one of the most famous and complete libraries in Mexico."<sup>95</sup> He invested in a trading house, which earned him eight hundred pesos a year in interest income.<sup>96</sup> When he traveled to Spain in 1755, he brought with him both a cook and black domestic slave, the very picture of the prosperous *americano*.

### **Mining Cases**

Gamboa's first documented case, his representation of the miner Antonio de Arrieta, illustrated many of the vexing issues in mining law in the eighteenth century. It arose over a property dispute, the most common reasons miners went to court. It involved the interpretation of statutory law, indicating the importance of written law in America, especially in areas of keen interest to the crown, like mining. The case also showcased how jurisdictional issues lay at the heart of many, if not most, legal disputes in colonial Spanish America.

The Arrieta lawsuit may have been the early triumph trumpeted in his résumé.<sup>97</sup> The case began as a conflict over property lines. Arrieta, Gamboa's client, staked a claim

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<sup>93</sup> Pérez-Perdomo, *Latin American Lawyers*, 35.

<sup>94</sup> "Relación de servicios, 1759."

<sup>95</sup> Ibid.

<sup>96</sup> AGI, Mexico, 2778, "Escriptura, 1769."

<sup>97</sup> The surviving record of the case, Gamboa's brief to the legal advisor of the viceroy, dates from shortly after Méndez's death. Bancroft Library, University of California, Berkeley, H.H. Bancroft Collection, C-C-4-5, "Representación Jurídica que haze [l] Don Antonio de Arrieta en el pleito que traje con Don Manuel San Juan Santa Cruz...sobre restitucion de sus minas en el Real de Santa Eulalia," Jan. 14, 1743.

in the Real de Santa Eulalia, in the present-day state of Chihuahua. This was a new district, opened up after 1718, and one of the furthest from Mexico City.<sup>98</sup> Manuel de San Juan controlled an adjacent property, and hit a rich vein of silver in his diggings. Arrieta, however, claimed this silver lay on his side of the property line. A common tunnel connected their two mines. After procedural to-ing and fro-ing at the local level, Arrieta and San Juan brought their dispute to the Audiencia of Guadalajara in the summer of 1735. The court ordered new measurements of the mines. On the basis of this survey, the Audiencia issued a definitive ruling on December 4, 1736, declaring Arrieta the rightful owner of the disputed section of the common tunnel. On April 30, 1737, local officials enforced the Audiencia's writ and Arrieta took possession of the mine.

The decision by the Audiencia should have resolved the matter. Only in exceptional cases would the Council of the Indies in Madrid, the supreme judicial authority for colonial Spanish America, agree to hear appeals from private lawsuits. San Juan, however, had the resources to petition the viceroy, Juan Antonio de Vizarrón, for a declaration that he was the rightful owner. As Gamboa later argued, San Juan probably misrepresented himself to the viceroy's legal advisor, failing to mention that the Audiencia of Guadalajara had already disposed of the case. Even though viceroys frequently pushed their authority into the judicial realm, they knew they had no right to hear appeals of Audiencia decisions. In this case, though, San Juan succeeded in securing the viceregal endorsement of his property on November 12, 1737. It took him until 1740, however, to convince the local governor to oust Arrieta. In May 1741, Vizarrón's successor, the duque de la Conquista, ratified the decision in favor of San Juan, on the basis that Vizarrón's declaration of 1737 had moved the matter into the viceroy's realm.

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<sup>98</sup> Gamboa, *Comentarios*, 503-504.

Arrieta continued the fight in Mexico City, seeing that the power of the Audiencia of Guadalajara was insufficient to protect his rights. He may have visited the chambers of Méndez in late 1741 to discuss his options. He decided to appeal to the Audiencia of Mexico, seeking to reinstate the original ruling in his favor made by the Audiencia of Guadalajara in December 1736. The Audiencia of Mexico agreed on May 12, 1742 – a week after the death of Méndez – that the ruling of its fellow high court should have determined the matter, perhaps persuaded by Gamboa's argument. Not to be denied, San Juan in the meantime had taken the precaution of securing a third viceregal declaration, dated April 1742.

On January 14, 1743, Gamboa filed a brief with Don Antonio de Andreu y Ferrar, the legal advisor of the new viceroy, the conde de Fuenclara, requesting that he disavow the various decrees issued by his predecessors and recognize the jurisdiction of the Audiencia of Guadalajara over the case. The pleading narrated this long saga in detail. His legal argument, however, was succinct. The viceroy had no authority to interfere in a matter before an Audiencia:

This is the principal nerve of the Jurisdiction of the Royal Audiencias of which our *Recopilación* is filled, especially in the Laws 36 and 37 of title 3, book 3 (as Solórzano teaches as well in book 5, chapter 3 of his *Política Indiana*) that in cases of civil or criminal justice the Excellencies the Viceroy shall allow the Royal Audiencias to proceed without being able to intervene in any way in their administration of justice.<sup>99</sup>

According to law contained in the *Recopilación*, viceroys had authority over the government of the mines, but not the litigation arising from them. Solórzano, the leading

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<sup>99</sup> "Representación Jurídica que haze [1] Don Antonio de Arrieta en el pleito que traje con Don Manuel San Juan Santa Cruz...sobre restitucion de sus minas en el Real de Santa Eulalia," 14. The original: "Este es el nervio principal de la Jurisdiccion de las Rs Audiencias de que tenemos llena nuestra recopilación; especialmente en las Leyes 36 y 37 tit. 3 lib. 3 para que en casos de Justicia cibiles o criminales dejen proseder los Ex/mos Señores Virreyes a las Rs. Audiencias: sin que puedan (como tambien enseña el S/or Solorzano lib. 5 cap. 3 Politic. vers. Y es cierto) entrometerse que conciernen a su administración de Justicia, interponerlo, o embarazarlo."

authority on Derecho Indiano, affirmed the point, as did a string of royal cédulas Gamboa cited.<sup>100</sup> To be sure, Gamboa also impugned the validity of the viceregal decrees on technical grounds, as well as defending the propriety of Arrieta's appeal to the Audiencia of Mexico. In the final paragraph of his brief, he addressed the equity of the situation. According to Gamboa, San Juan had deceived the viceroys. In the two years he controlled the mine, from 1740 to 1742, the miner earned the extraordinary sum of one hundred and fifty thousand pesos, profit that should have gone to Arrieta.

Like most mining cases, the law at issue in the Arrieta-San Juan lawsuit was royal written law. Roman law could come into play, in matters of procedure or remedies, but for the most part statutory law governed the industry. The central legislation was the Mining Ordinances of 1584, known as the *Nuevo Cuaderno* to distinguish it from the earlier 1567 mining laws. Philip II issued this statute for all of his domains. It applied automatically in New Spain, although tailored to meet the viceroyalty's particular circumstances. In the Arrieta case, however, none of its provisions were in question. Rather, the issue at stake was purely jurisdictional.

Most of Gamboa's mining cases, however, did arise from differing interpretations of the Mining Ordinances. The most problematic provision was Ordinance 30. It provided that if a miner burrowed into another's property and found metal, he was entitled to all he found until his workings connected with his neighbor's. He would then have to withdraw to his property line. Gamboa commented that:

Of all the Ordinances contained in the new Cuaderno, and the Law of the old ones, none is more difficult, nor more common in the courts as the present. Hardly is there a serious lawsuit that is not about tunnels.<sup>101</sup>

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<sup>100</sup> In the *Comentarios* Gamboa cited a long list of authorities on this point: Laws 35, 37, 38 and 60 of Title 3, Book 3 of the *Recopilación*; Laws 34 and 35 of Title 15, Book 2; and Law 24, Title 12 and Book 5. He also cited Chapter 3 of Book 4 of Solórzano's *Política Indiana*. Gamboa, *Comentarios*, 470.

<sup>101</sup> *Ibid.*, 284.

The rationale for the provision was to encourage mining activity, for the good of the community and the royal coffers in particular. Since the crown controlled subsoil minerals, individuals had no strong claim to prevent others from searching or exploiting minerals on their nominal property. The problem, however, was that this provision encouraged abuse. Miners drilled *bocas ladronas*, or dishonest shafts, solely to dig beneath a neighbor's claim. One could follow a vein into another's property but could not dig a shaft deliberately to access a known deposit on the other side of the property line.

In 1748 Gamboa represented Juan Moreno de Mesa, the owner of the *Cabrera* mine in Guanajuato, in a dispute with Doña Francisca de Sardenata, the owner of the *San Antonio* mine and the widow of José de Sardenata, one of the pioneers of the rich Guanajuato district. In excavating a second shaft on his property, Moreno encountered a tunnel dug from the *San Antonio* within what he claimed were the limits of his own claim. Sardenata countered that she controlled the property and that Moreno's second shaft was a *boca ladrona* built solely to steal from her. Gamboa won the case for his client in the Audiencia of Mexico, which recognized Moreno's property stakes and ordered Sardenata to retreat.<sup>102</sup>

In another Guanajuato case from the early 1750s, Gamboa advised Alonso Cid Fernández and his partners, the owners of the *San Vicente* mine, against the heirs of Manuel Gómez Corban, owners of the *Santa Anita*. The miners of *Santa Anita* extended a tunnel into the limits of Cid's property. In 1751 New Spain's most esteemed miner, José de la Borda, measured the tunnel for the parties and proposed an interior guardrail to delineate the two claims. The Gómez Corban party refused to accept it, arguing that since they built the tunnel, they were entitled to work its entire length. Gamboa argued

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<sup>102</sup> Ibid., 278.

successfully before the audiencia of Mexico that Ord. 30 supported Borda's guardrail and thus his client Cid's position.<sup>103</sup>

Gamboa's most famous mining case, his representation of the Agustín Moreno y Castro, the marqués de Valle Ameno, against Pedro Romero Terreros, New Spain's richest miner, concerned the interpretation of another tricky provision of the mining statute, Ord. 37. This stipulated that mine owners had to keep at least four workers on site continually, with no more than a four month interruption, in order to maintain a valid claim. Again, like Ord. 30, the intention of the provision was to encourage the active working of mines. Individuals could not sit idly on mineral claims.

At stake in the Valle Ameno-Terreros lawsuit was one of the richest silver ore bodies in America, the *veta vizcaína* in Real del Monte. In 1697, the Italian traveler Giovanni Gemelli Careri visited this district close to Mexico City. He descended four hundred feet down one of the shallower shafts and declared he had never done anything so crazy in his life out of pure curiosity.<sup>104</sup> By the 1730s, however, water had inundated these deep mines. In 1739, the miner José Alejandro Bustamante secured an agreement with the viceregal government for a number of concessions, including the provision of draft labor and title to all the mines along the formation, in exchange for digging a massive drainage tunnel, or adit, to rescue the district.<sup>105</sup> He secured the financial backing in 1741 of an Andalusian immigrant merchant in Querétaro, Pedro Romero Terreros, who became Bustamante's equal partner in 1743. They spent nine years building a tunnel, which unfortunately failed to drain the mines.

In 1747 Bustamante invited his brother-in-law, the wealthy landowner Agustín Moreno y Castro, the marqués de Valle Ameno, to invest in a new tunnel in exchange for

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<sup>103</sup> Ibid., 232.

<sup>104</sup> Paraphrased by Gamboa in Ibid., 478.

<sup>105</sup> Francisco Canterla y Martín de Tovar, *Vida y obra del primer Conde de Regla* (Seville, 1975), 19-20.

title to a single mine, the *San Vicente*, along the vein. Soon thereafter, the tunnelers digging the adit unearthed an exceptionally rich section of the lode within the confines of the *San Vicente*. In 1750 Bustamante, who had honored the agreement with his brother-in-law, fell off a horse, contracted gangrene, and died. Terreros succeeded him and immediately initiated proceedings to overturn the 1747 agreement.<sup>106</sup> He argued that Valle Ameno had failed to keep the minimal number of workers employed at his property as required by Ord. 37, thus forfeiting title to the *San Vicente*. The mine should revert to Terreros, as the legal heir to Bustamante.

Gamboa put forth the argument on behalf of Valle Ameno that because the mine was flooded at the time, it was impossible for his client to obey the strict letter of Ord. 37. He did what was reasonable in the circumstances, keeping some above-ground drainage winches in operation. He fully complied with the spirit of the provision through his investment in the common adit. It was, in any case, highly specious for Terreros to claim that Valle Ameno was in breach of the law for not keeping four men employed on his claim. Terreros himself enjoyed the privilege guaranteed by the 1739 agreement to maintain title to thirty-nine separate claims along the veta vizcaína on the basis of building a single adit. In 1753, the Audiencia of Mexico ruled in favor of Valle Ameno.

As seen already in the Arrieta matter, a ruling by the Audiencia did not always determine the matter. A rich and relentless litigant like Terreros had other options. He did not go to the viceroy as Manuel de San Juan had done, nor did he exercise his right to request the Audiencia to revisit its decision. In 1757, he sought standing to appeal directly to the Council of the Indies. The Council refused to hear him. The *oficial mayor*,

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<sup>106</sup> Edith Boorstein Couturier, *The Silver King: the Remarkable Life of the Count of Regla in Colonial Mexico* (Albuquerque, 2003), 47-62.



Don Pedro de la Vega, warned of the mayhem that would ensue if litigants did not follow established channels for their appeals:

For the mercy of the Prince should not be extended in favor of one who has it in his power to apply for the ordinary remedies allowed by the Common Law, but has chosen to waive or renounce it, as has been done by Terreros, and if the appeal were admitted, the greatest inconvenience would ensue, that everyone would abandon the courts of first instance, and the ordinary remedies of law, and would have recourse to new and extraordinary remedies, tending to bring the superior courts into disrepute, to detract from the authority of decisions, which ought to be regarded as definitive, to prejudice the interests of the public, and to bring irreparable injury upon the parties concerned.<sup>107</sup>

Terreros then filed a petition with the Audiencia of Mexico to review its earlier decision, as he should have done originally. The court promptly reaffirmed its earlier ruling in favor of Valle Ameno in 1759.

The next move by Terreros illustrated a major challenge to the integrity of the legal system in New Spain: a powerful person could subvert the law at the local level. Having exhausted all legal remedies, Terreros sent men to occupy the *San Vicente* mine by force. The Valle Ameno family resisted, and fighting between partisans of the two sides broke out in the streets of the nearby town of Pachuca.<sup>108</sup> The Audiencia fined Terreros five thousand pesos for the illegal occupation of the mine, yet he still refused to yield. Finally, in January 1766, the Valle Ameno family signed over title of *San Vicente*.<sup>109</sup> Terreros then controlled the entire veta vizcaína, drained at last of water and

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<sup>107</sup> Quoted in Gamboa, *Comentarios*, 328-330. The original: "...No tener lugar, por no deberse extender la gracia de el Principe a favor de el que teniendo en su mano el remedio ordinario de el Derecho Comun, que por las Leyes le compete, lo renuncia, y omite, como se sucedió a Terreros, y que si se diese lugar al Recurso, se seguirian gravissimos inconvenientes; pues todos con facilidad, abandonando las primeras Instancias, y remedios ordinarios de el Derecho para su seguimiento, se retraherian, intentando otros extraordinarios, en desprecio de los Tribunales Superiores, de la autoridad de la cosa juzgada, y de la Causa Pública, con irreparable perjuicio de las Partes." Gamboa was in Madrid during this period, representing the consulado, and probably represented the position of the Valle Ameno family (the marquis had died in 1755) before the Council.

<sup>108</sup> The marqués de Valle Ameno had died in 1759, leaving his estate to his minor children, under the trusteeship of administrators.

<sup>109</sup> Couturier, *The Silver King*, 64-65.

restored to vitality. He stood at the pinnacle of Mexican mining, the Midas of New Spain.<sup>110</sup>

These mining cases, from Arrieta's in the early 1740s to the dramatic conflict at Real del Monte, were the first pillar of Gamboa's legal practice. They made him an expert of the Mining Ordinances of 1584, and exposed him to the technical and economic issues of industry. They taught him the importance of safeguarding the jurisdiction of the Audiencias. In his documented cases, including those he mentioned in the *Comentarios*, he always argued in favor of the authority of the Audiencias. He may have simply chosen to highlight such cases in the interest of proving his commitment to the institution he aspired to join. Nonetheless, there is a consistency in his views, suggesting that during his days as a practicing lawyer he realized that the *estado de derecho* could best be protected in New Spain through a strong and independent high court of royal justice.

### **Ecclesiastical cases**

Gamboa also inherited as a client from Méndez the Mexican Province of the Discalced Carmelites, a mendicant order. In contrast to the mining cases, the business he transacted for them concerned mostly private law, such as estates and contracts, and thus in the domain of the common law, the Roman law compiled in the *Partidas*.

Two of the Carmelite cases presented typical fact scenarios for the eighteenth century: an executor dissipating an estate and a convent administrator trying to pass off a shortfall in accounts on his *fiador* (guarantor). In both cases Gamboa filed long briefs full of common law citations, mostly in Latin, from the *Partidas* to more contemporary European jurists. In the first case, he defended a writ of sequestration the Audiencia of

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<sup>110</sup> Francisco de Solano, *Antonio de Ulloa y la Nueva España : descripción geográfico-física de una parte de la Nueva España de Antonio de Ulloa, y su correspondencia privada con el virrey don Antonio María de Bucareli* (México, 1979), 83-89.

Mexico had issued against the bad executor, Francisco Zapata, who had thwarted his deceased brother-in-law's intention to bequeath two haciendas to the Carmelites. Gamboa relied primarily on the authority of Francisco Salgado de Somoza, whose *Labyrinthus creditorum concurrentiae* of 1646 remained the leading Spanish text on debtor-creditor law.<sup>111</sup> In the second case, he defended the fiador, Joaquin Fermín de Echaurri, again citing a mountain of common law authorities, to declare null and void on the grounds of deceit the agreement Echaurri signed with Francisco Perez de la Raya, the convent administrator. Such cases involving common law issues may have been more representative of Gamboa's work as a lawyer than the mining lawsuits, since most areas were not as regulated by statute as the mining industry.<sup>112</sup>

One case Gamboa handled for the Mexican Province of the Carmelites attracts particular attention because of its creole-peninsular dimension. Each year the Carmelite order chose six *definidores*, or governing officials, from among the members of each of their provinces. For their American province of San Alberto, corresponding to New Spain, outside friars were eligible for the positions, on account of the lack of qualified local candidates when the community was first established. Pope Clement VIII issued a bull at the beginning of the seventeenth century endorsing this variance of the Carmelites' own rules. By the eighteenth century, however, creole friars complained that their Spanish-born brethren used the papal bull to monopolize appointments as *definidores*. There were now enough local candidates in New Spain to apply the Carmelite's original constitution.

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<sup>111</sup> Tomás y Valiente, *Derecho Español*, 315.

<sup>112</sup> Gamboa's biographer, Toribio Esquivel Obregón, examined a collection of Gamboa's briefs on behalf of the Carmelites, collected by bibliophile Manuel Cervantes. They could be part of the Cervantes Collection of the University of Guanajuato, although I have been unable to verify this. See Esquivel Obregón, *Biografía de Don Francisco Javier Gamboa*, 101-142.

Gamboa wrote a brief on behalf of the Mexican-born Carmelites, arguing that the condition that had justified the exception in the first place had expired. He quoted the Jesuit jurist and theologian Francisco Suárez at length, in Latin, on the proposition that when changed circumstances rendered the enforcement of a law unjust, the law *ipso facto* lost its juridical value. In other words, a law issued by a legitimate authority, valid for one time or place, could be rightfully impugned as invalid at another time or place. This view of law, which focused on its intrinsic qualities, was first articulated in Spain by Saint Isidore of Seville in the seventh century. He wrote that for law to be in essence law, “it has to be honest, just, possible, appropriate to the time and place, necessary, useful, and clear.”<sup>113</sup> This concept of law gave rise to potent legal arguments in the Indies, not only against church law that discriminated against creoles but against any law considered inappropriate in light of local circumstances. The scant notice that exists of this case does not include, however, either its date or outcome.<sup>114</sup>

Gamboa’s most important work on behalf of a religious community was his 1750 representation on behalf of the abbot and canons of the new college, or Colegiata, attached to the basilica of the Virgin of Guadalupe. It pitted him against the formidable archbishop of Mexico, Manuel Rubio y Salinas, a Spanish-born canonist. It concerned one of the most pressing issues in the middle of the century, the *real patronato*, or the patronage the Spanish king enjoyed over the church in Spain and America. Gamboa advanced a hard-line regalist argument against the archbishop, consistent with his belief in the supremacy of royal over ecclesiastical authority.<sup>115</sup>

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<sup>113</sup> Quoted in Víctor Tau Anzoátegui, “La noción de ley en América hispana durante los siglos XVI a XVIII,” in *La Ley en América Hispana del Descubrimiento a la Emancipación* (Buenos Aires, 1992), 37.

<sup>114</sup> Esquivel Obregón, *Biografía de Don Francisco Javier Gamboa*, 118-119.

<sup>115</sup> Benson Latin American Collection, Austin, Edmundo O’Gorman Collection, G-8, “Alegato del jurista D. Francisco Xavier Gamboa por la Colegiata con motivo de que se deben reconocer las regalías de Su Magestad,” 1750.

The intention of the founders of the Colegiata was that it should be exempt from the jurisdiction of the archbishop of Mexico, on the model of a similar college of canons in Córdoba, Spain. The crown approved its founding on this basis by royal *cédula* on May 27, 1749. Archbishop Rubio, however, refused to comply with the royal decree and carry out the investiture of the abbot, Fr. Juan de Alarcón, and his canons. To block the new canons, Rubio demanded, through his *promotor*, or legal representative, Don Antonio Medina, to be informed of the “status of the sanctuary; its rents, collected and what should be collected; its expenditures, for what ends and with what powers.”<sup>116</sup> Despite the founders’ intentions ratified by royal decree, Rubio thus refused to allow the exemption from his authority. Gamboa composed a legal brief addressed to the viceroy, the conde de Revillagigedo, requesting that he fulfill the royal will by inviting the bishop of Puebla, second in the novohispano episcopal hierarchy, to carry out the investiture ceremony so the Colegiata could begin functions as an autonomous body.

Gamboa’s argument was a no-holds barred defense of the king’s authority over the church, using language reminiscent of what Caroline ministers later deployed against the Audiencia. In his opening statement he wrote:

The high powers of kings do not need defenses among the vassals, as they rest on the throne of His Majesty as attributes of his sovereignty, and do not only oblige strictly Veneration and respect but demand all of the vassals’ attentions.<sup>117</sup>

Gamboa here assumed the regalist line that the king’s power over the church was inherent in his sovereignty and not a papal concession. There was no consideration of whether the decree was intrinsically just or not. As the king’s law it was deemed unimpeachable. He claimed that the archbishop had flagrantly violated the royal will in stopping the inauguration of the Colegiata. Diplomatically, Gamboa put the blame on Rubio’s legal

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<sup>116</sup> Ibid., f. 2.

<sup>117</sup> Ibid., f. 1.

representative Medina, who claimed that the cédulas approving the Colegiata had been attained through false testimony. Gamboa railed against Medina:

And what makes his audacity even more worthy of attention, is how scandalous his bad example is in the Indies, where the royal ministers should look after themselves more, for the greater the distance from the Prince, and believing themselves to be like the dead on account of this distance, the greater their attention should be, in order to conduct themselves with honor as well as to validate the Royal Rights and Authority in the kingdom, where there are no arms but the yoke of Obedience.<sup>118</sup>

Officials in America, Gamboa suggested, might have a special duty to revere the king's commands. Although not cited, Solórzano made the same point in his *Política Indiana*.<sup>119</sup> In the end, however, despite Gamboa's fervent regalist plea, Revillagigedo refused to intervene. The abbot and canons had no choice but to accept the archbishop's authority. When the Colegiata was officially inaugurated, on October 25, 1751, it was under the jurisdiction of the archbishop of Mexico.

Revillagigedo probably reckoned that his government had little to gain from alienating the archbishop in this matter. He might also have been persuaded that the archbishop had a strong historical and legal case to deny any exemption to his authority over a site that had always been associated with the bishops of Mexico. After all, the cult of Guadalupe began in 1531 when the Indian peasant Juan Diego presented his miraculously imprinted cloak to Mexico's first bishop, Juan de Zumárraga. More recently, Rubio's predecessor, Juan Antonio de Vizarrón, led the effort to proclaim Guadalupe the patroness of Mexico City and New Spain, after she alleviated the suffering caused by the typhoid epidemic of 1736-37.<sup>120</sup> Mexico City's bishops had always been

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<sup>118</sup> Ibid., 36.

<sup>119</sup> Solórzano Pereyra, *Política Indiana*, V, XVI, 6.

<sup>120</sup> Brading, *Mexican Phoenix*, 120-126.

the leading advocates of the cult of Guadalupe and it struck Rubio as offensive to deny the archdiocese jurisdiction over the college of canons.

Gamboa's strong regalist argument echoed the mid-century mood in Spain. The chief minister of Ferdinand VI, the marqués de la Ensenada, was preparing in the late 1740s to negotiate a new concordat with the papacy to reaffirm the *patronato*, the Spanish king's patronage over the church in his domains. It was Ensenada who had authorized the Colegiata as an exempt body. In 1753 the Spanish crown signed the new concordat with Rome, reinforcing its position in ecclesiastical appointments. It also set the stage for the regalism of Charles III, which sought to extend royal power not only over the church but over other secular institutions as well. Gamboa may well have shared the conception of regalism he argued in the Colegiata case that limited its force to the church. He did not agree with the more expansive notion, which targeted judicial power.

### **The Case of Manuel Rivas Cacho**

Gamboa's most celebrated case was his defense of Manuel de Rivas Cacho, a former prior of the consulado of Mexico and leader of its *montaños* party.<sup>121</sup> The representation became famous not only for the social position of Rivas Cacho, but also because it was published as a two-volume book.<sup>122</sup> This raised Gamboa's profile in the legal community and salvaged the reputation of Rivas Cacho, who was severely maligned

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<sup>121</sup> Rivas Cacho served as prior of the consulado in 1749 and 1750. The organization was divided into two rival groupings, the *vizcaínos* and the *montañeses*, the latter from the Santander region in northern Spain, west of the Basque country. Christiana Renate Borchart de Moreno, *Los mercaderes y el capitalismo en la ciudad de México: 1759-1778*, Alejandro Zenker trans. (México, 1984), 239; Guillermina del Valle Pavón, "Los excedentes del ramo Alcabalas. Habilitación de la minería y defensa del monopolio de los mercaderes de México en el siglo XVIII," *Historia Mexicana* LVI (2007): 983.

<sup>122</sup> Francisco Xavier Gamboa, *Por el coronel D. Manuel de Rivas-Cacho, en el pleyto que sobre testamento de Da. Josepha Maria Franco Soto, su muger, le ha movido el Br. D. Juan Joseph de la Roca, presbytero de este arzobispado de México; para que los Señores de la Real audiencia se sirvan de confirmar la sentencia de visita de 1 de junio de este año: en que declaraon por ultima voluntad de Doña Josepha el testamento nuncupativo de 24 de febrero de 1751* (México, 1753).

in the course of the proceedings. In it Gamboa displayed his erudition and mastery of the common law authorities in the field of estate law. The case also exemplified the weight that equitable considerations, outside strict law, carried in lawsuits of the era. Because the judiciary was most concerned with rendering justice in the particular case, a party might triumph even if the law supported the other side.

Rivas Cacho's wife, Doña Josefa María Franco Soto, died on March 2, 1751, leaving a number of conflicting wills. The first, dated in 1731, declared her husband her sole heir. The second, dated February 4, 1749, written on ordinary paper and not notarized until April 22, 1750, left her estate to her confessor, Fr. Juan José de la Roca. The third, written on stamped paper and notarized on February 24, 1751, revoked all previous wills and named her husband again as sole heir and executor. A final will, dated February 28, 1751, just before her death, revoked the will of four days earlier, claiming she made it under duress and restoring the earlier one of April 22, 1750, which left her estate to Fr. Roca. Doña Josefa signed this last will but not before witnesses or a notary.

Gamboa had two tasks in his defense of Rivas Cacho. First, he had to untangle the knot of testaments, to determine the effective one. This was in fact the easiest part of the argument, since the last document executed properly was clearly the one of February 24, 1751, in favor of his client. Nevertheless, in such a case, a lawyer could take no chances. Gamboa wrote a lengthy treatise on estate law, analyzing each instrument in turn, and invoking an eclectic bibliography of authorities, including Aristotle, Horace, Ovid, the Gospel of Luke, the epistles of Paul, common law jurist Bartolus de Saxoferrato, Diego de Covarrubias, the Cardinal Luca, Gregorio López, Juan Bautista Larrea, Francisco Salgado de Somoza, Arnold Vinnius, and eighteenth-century writers Feijóo and Charles Rollin, author of a history of ancient Egypt.<sup>123</sup>

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<sup>123</sup> Esquivel Obregón, *Biografía de Don Francisco Javier Gamboa*, 160-164.



Gamboa's more difficult problem was tilting equity in favor of his client. Fr. Roca had won the first round of their lawsuit by convincing a lower-division judge that Rivas Cacho had exercised tyrannical control over his wife. According to the confessor, the husband had prevented Doña Josefa from carrying out her pious and charitable impulses, keeping her on a miserly allowance. She could not give alms to beggars, pay for masses, or help orphans, as her heart dictated. With these circumstances in mind, the *juez de Provincia* ruled in the priest's favor, finding that the April 22, 1750 testament best represented her last intentions. Gamboa turned the tables, portraying Roca as a conniving priest who took advantage of a sick and devout woman. He also argued that the evidence suggested that Fr. Roca had forged the February 28, 1751 instrument and then presented it fraudulently in court. The Audiencia of Mexico ruled on appeal in Rivas Cacho's favor. Gamboa not only salvaged the estate of his client's deceased wife but, perhaps more importantly, the honor of Rivas Cacho, who was later instrumental in the appointment of Gamboa as one of the Madrid deputies of the consulado.<sup>124</sup>

## Conclusion

In the courtrooms, Gamboa received his real education in the law. From a law student capable of dissertating on the Digest of Justinian, he quickly gained a reputation as a formidable and versatile advocate, equally versed on the intricacies of the mining statute as on the common law jurisprudence of estates. Reading his legal briefs and the descriptions of some of his cases offer intriguing leads to his later thinking about the law. From his first recorded case, the Arrieta representation, he made arguments in favor of the jurisdiction of the Audiencias over mining lawsuits that became central to his own legal philosophy. He also articulated in these cases a conception of law, focusing on its

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<sup>124</sup> Ibid., 142-164; Otero, "Apuntes para la biografía de Don Francisco Javier Gamboa," 315.

internal requisites, that informed his later positions in favor of judicial discretion in the reading of royal law. Of course, as a lawyer his primary duty was service to his client, and if they demanded an argument contrary to his own beliefs, he complied. One should not attempt, therefore, to read too much of his own thinking in his forensic arguments.

What his cases clearly illustrate, however, was the vitality and sophistication of legal culture in mid-eighteenth century New Spain. Lawyers drew upon a vast reservoir of jurisprudence in crafting arguments, including biblical, philosophical and historical sources. Statutory law meshed without entanglements with the Roman law encoded in the *Partidas*. Despite what Bourbon legal reformers suggested about the lack of respect for royal law, especially in the Indies, statutes played a central role in the legal order, regulating the mining industry and the relationship between public institutions. The *Partidas* stood in the background, but the *Recopilación* of 1680 occupied the middle ground in most matters, offering lawyers a handy, authoritative guide to old royal legislation in the Indies.<sup>125</sup> Legal disputes often spilled out from the courtroom, sometimes leading to dispute resolution through fisticuffs or chicanery. Cases took years to wind their ways through the courts. These problems, however, were hardly unique to New Spain; indeed, even countries today praised for their adherence to the rule of law experience the same problems. Gamboa had the intellectual resources and the fighter's instinct to thrive in this world. He could suggest ways to improve the administration of justice in New Spain but he saw no need to overhaul it.

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<sup>125</sup> There is some controversy over the importance of the *Recopilación* in the legal system. It never served as an infallible code of written laws but merely as a useful if incomplete guide. See Pérez-Perdomo, *Latin American Lawyers*, 19; Tau Anzoátegui, *Nuevos horizontes*, 41-43.

### Chapter Three: Gamboa and the Basque Atlantic, 1745-1764

Even though a *vizcaíno* finds himself absent from his patria, he always finds himself in it when he meets a fellow countryman. They have among themselves such unity, that the best recommendation one can have for another is the simple fact of being *vizcaíno*...<sup>126</sup>

*José Cadalso, Cartas Marruecas, ca. 1774*

#### Introduction

Francisco Xavier Gamboa possessed the talents necessary to succeed as a lawyer. He was intelligent, shrewd, diligent, and sociable enough to build relationships with people who could help him. This chapter examines the important connections he forged within the transatlantic Basque community.<sup>127</sup> As a young lawyer in the 1740s, Gamboa joined Nuestra Señora de Aránzazu, a religious confraternity, mutual aid society, and financial institution that brought together the elite families of Basque descent in Mexico City. He acted as Aránzazu's lawyer, notably in its effort to open an independent school for girls, the *Vizcaínas*. Many members of Aránzazu also belonged to the consulado of Mexico, the merchants' guild. Gamboa traveled to Madrid in 1755 to represent both Aránzazu and the consulado at the royal court. His Basque mercantile patrons in Mexico City supported his quest to seek an Audiencia appointment, recommending him to influential friends in Madrid. They also subsidized him in Madrid as he wrote his analysis of Mexico's mining laws, the *Comentarios a las Ordenanzas de Minas*. He included in this juridical text a plan to create a mining bank under consulado control. The Basque

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<sup>126</sup> José Cadalso, *Cartas Marruecas*, 24th ed. (Madrid, 1999), Carta XXVI, 107. A *vizcaíno*, literally a person from Vizcaya, or Biscay, was the common term used for Basques in the eighteenth century.

<sup>127</sup> For the importance of patron-client networks in the organization and regulation of power in colonial Mexico, see Cañeque, *The King's Living Image*, 159.

network, which spanned the Atlantic and wove together religious, philanthropic and economic threads, provided the social foundation of Gamboa's legal career.

David Brading and other historians have called attention to Gamboa's close ties to Mexico City's merchants. According to Brading:

Despite the legal and technical brilliance of his commentaries, Gamboa emerged as the political advocate of the great import houses and silver banks of Mexico City. Precisely at the time when the statesmen of the Bourbon dynasty were moving to undercut the position of the colonial merchant-monopolists, Gamboa wished to subject the entire Mexican silver mining industry to the control of the consulado and the mercantile oligarchy.<sup>128</sup>

Gamboa undoubtedly served the social and economic interests of the merchants, especially those of Basque background. The important question, however, which this chapter addresses, is what exactly were these interests? Since Lucas Alamán, in the mid-nineteenth century, historians have tended to see the merchants of the consulado as an anchor of the Spanish colonial system, a tightly knit, peninsula-born group who put their own economic concerns and loyalty to the mother country before the needs of Mexico.<sup>129</sup> Alamán drew a sharp contrast between the spendthrift creoles and the disciplined peninsula-born Spaniards, a distinction that has hardened into stereotype.<sup>130</sup> Historians especially assume growing tension between *criollos* and *peninsulares* during the period of the Bourbon reforms, setting the stage for Mexican independence.<sup>131</sup> The Basque

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<sup>128</sup> Brading, *Miners and Merchants*, 162. See also María del Refugio González, *Ordenanzas de la Minería de la Nueva España formadas y propuestas por su Real Tribunal* (México, 1996), 53; Stein and Stein, *Apogee of Empire*, 229; Trabulse, *Gamboa*, 45.

<sup>129</sup> Speaking of the rivalry in the consulado between Basques and Montañeses, Alamán wrote in the early 1850s that “pero nunca estas divisiones de provincialismo eran tan transcendentales, que lleguesen a distraer a los españoles de los grandes intereses de su patria, y de ejercer a una su predominio en Nueva España.” Lucas Alamán, *Historia de Méjico, Tomo Primero* (México, 1942), 64. For a revisionist view, stressing the creole presence and influence in the consulado, see John E. Kicza, *Colonial Entrepreneurs, Families and Business in Bourbon Mexico City*, 1st ed. (Albuquerque, 1983).

<sup>130</sup> Alamán, *Historia de Méjico, Tomo Primero*, 68.

<sup>131</sup> See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, 1983); Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867*; John Lynch, *The Spanish-American Revolutions, 1808-1826* (New York, 1973).

merchants of the consulado whom Gamboa represented appear in the historiography as a distinct caste, who exploited native-born Mexicans through their tight control over commerce and steadfastly defended Spanish colonialism.

A close examination of the community in the mid eighteenth-century, however, reveals a more nuanced and complicated picture. I argue that the Basques largely transcended the creole-peninsular distinction, engendering a more fluid transatlantic or imperial identity. The simple fact that rich peninsula-born Basque merchants in Mexico City chose Gamboa, a creole from Guadalajara, to represent them in Madrid suggests the lack of importance they ascribed to the Atlantic as a symbolic or even physical divider. The Spanish-born members of Aránzazu celebrated the feast day of the Virgin of Guadalupe, the creole icon, with as much fervor as that of their namesake Virgin. The Basque circle was undoubtedly exclusive, but within it people born in Spain and America interacted as relative equals, intermarried, and shared religious devotions, economic ideas and political philosophies. The Basques implanted in New Spain their enthusiasm for self-government, symbolized by the *fueros* that guaranteed the autonomy of the Basque regions of Spain. The charter Gamboa wrote for the Vizcaínas, Aránzazu's school for girls, was in effect a miniature *fuero*, guaranteeing the school's independence from episcopal control. In a grander sense, his defense of *Derecho Indiano*, on the grounds of the space it afforded American particularities, may have owed something to the Basque influence.

The Basque acceptance of creoles as equals - at least those with Basque ancestry - reflected larger economic concerns. Contrary to their historiographical image as colonial robber barons, the peninsula-born merchants of the consulado, Basques prominent among them, saw the advantages of the autonomous development of the viceroyalty. The briefs filed by Gamboa in Madrid on their behalf illustrated their economic preoccupations. To

be sure, when given the opportunity, they colluded, cut corners, cheated on taxes, and engaged in other unsavory practices that businessmen have refined over the centuries. They defended - perhaps even through bribery - their legal monopoly over trade. But it was simply rational behavior to insist on legal rights that lowered the risk of doing business and thus made profits more secure.<sup>132</sup> Not only that, the old *flota* and *feria* system provided salutary protection for the Mexican economy. It helped assure that New Spain's principal export – silver pesos – circulated within the country, stimulating domestic commerce, agriculture, mining, and social development, before being loaded onto ships in Veracruz. It fostered the accumulation of capital in the hands of local investors. Campomanes, the influential economic advisor of Charles III, discerned that the power of the Mexico City merchant community threatened the bonds of colonialism, and for this reason rejected Gamboa's proposed consulado-led mining bank. Gamboa, a proud creole as well as a transatlantic Basque, supportive of greater freedom for New Spain within the Spanish monarchy, saw no conflict in defending the economic interests of the Basque merchants and the consulado they dominated.

### **The Cofradía de Nuestra Señora de Aránzazu**

The religious sodality of Nuestra Señora de Aránzazu brought together the top one hundred of the four hundred Basque families in Mexico City in the mid-eighteenth century.<sup>133</sup> Founded in 1681, the association was dedicated to the Virgin of Aránzazu, who appeared miraculously to a shepherd boy in 1469 in the mountains of Guipúzcoa. Just as Mexicans believed the Virgin of Guadalupe appeared to a humble Indian at Tepeyac in 1531 to signal God's special favor towards them, the Basques saw the

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<sup>132</sup> In this regard, see Jeremy Baskes, "Risky Ventures: Reconsidering Mexico's Colonial Trade System," *Colonial Latin American Review* 14 (June, 2005).

<sup>133</sup> Luque Alcaide, *Aránzazu de México*, 58.

Virgin's apparition at Aránzazu as proof of their own exalted status. As the Franciscan friar Juan de Luzuriaga argued in a panegyric published in Mexico City in 1686, the Virgin of Aránzazu sanctified the universal nobility of the Basque people.<sup>134</sup> Basques saw themselves as the original Iberians, speaking a language acquired at the Tower of Babel and practicing a monotheistic faith even before the apostle James (Santiago) arrived to spread Christianity in the peninsula. During the period of Muslim domination, they believed they had remained pure, untainted by Moorish or Jewish blood, and hence Old Christians by definition. The Virgin of Aránzazu called on this distinct and proud people from the provinces of Biscay, Guipúzcoa and Álava, and the kingdom of Navarre, to set aside their differences and form a single nation. This message of unity resonated in the eighteenth century, as the Bourbons began to centralize power, both in the peninsula and the overseas empire.<sup>135</sup>

Nuestra Señora de Aránzazu functioned as a center for the religious, social, economic and philanthropic life of the Basque community in Mexico City. It organized masses and fiestas in honor of Basque and creole saints, including San Ignacio de Loyola, San Fermín, San Francisco Xavier, and the Virgin of Guadalupe. Through its endowment, it supported poorer members of the community, putting up dowries and paying funeral expenses. The confraternity sponsored the construction of a massive residential college for girls and young women, the Colegio de San Ignacio de Loyola, better known as the Vizcaínas. It also made loans from its endowment, usually to Basque merchants and

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<sup>134</sup> Juan de Luzuriaga, *Paranympho celeste; historia de la mystica zarza, milagrosa imagen, y prodigioso santuario de Aránzazu, de religiosos observantes de nuestro seráfico padre San Francisco en la provincia de Guipúzcoa de la region de Cantabria* (México, 1686).

<sup>135</sup> Francisco Fernández Pardo, *La independencia vasca: La disputa sobre los fueros* (Madrid, 1990), 8. Basques found brotherhoods dedicated to Aránzazu in Lima in 1635, Arequipa in 1660, Mexico in 1681, Guadalajara in 1775, and Puebla in 1788. See Elisa Luque Alcaide, "Asociacionismo vasco en Nueva España," in *Los vascos en las regiones de México: siglos XVI-XX*, ed. Amaya Garritz (México, 1996), 68-70.

sometimes to the consulado itself, at the standard rate of five per cent at five years.<sup>136</sup> As a separate corporate entity, Aránzazu owned property and received testimonial bequests, giving it significant economic heft in New Spain. The majority of its rectors in the eighteenth century came from the mercantile community, with many of them priors (director) or consuls (deputies) of the consulado.

Gamboa joined Aránzazu in the early 1740s. His close friend Miguel de Berrio, from a better connected Basque family in New Spain, may have sponsored him. By 1745, at the age of twenty-seven, Gamboa ran as a candidate in elections for the governing board. The next year members elected him one of the representatives of the Mexican-born Basques. He served consecutive two-year terms on the board until 1750.<sup>137</sup> It was during these years, in 1747, that he married Maria Manuela de Urrutia, a seventeen-year old creole of Basque descent, perhaps a niece of José Mesia de la Cerda, Gamboa's old mentor, who also married an Urrutia.<sup>138</sup> The couple had at least seven children who survived infancy.<sup>139</sup> Their older son Juan José, born in 1749, studied theology at the University of Valladolid in Spain and served in the cathedral chapter of Mexico City from the 1780s to the 1820s.<sup>140</sup> In 1776, when Gamboa himself became rector of Aránzazu, his wife, three oldest daughters, Gertrudis, Josefa, and Francisca, and younger son, Manuel, also joined the confraternity.<sup>141</sup>

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<sup>136</sup> Clara García, "Sociedad, crédito y cofradía en la Nueva España a fines de la época colonial: el caso de Nuestra Señora de Aránzazu," *Historias* (March 1983, 1983): 59-64.

<sup>137</sup> AHCv, 006-III-015, "Aránzazu Book of Elections."

<sup>138</sup> Parroquia Asunción Sagrario Metropolitano, Registros parroquiales, 0035273 (Church of Latter-Day Saints), "Marriage Certificate, Oct. 14, 1747."

<sup>139</sup> "Relación de servicios, 1759." Another son, born in 1754, apparently died in infancy as he was given the same name, Manuel José, as the son born in 1765.

<sup>140</sup> Juan José de Gamboa, as a cathedral canon, was a sponsor of the return of the Jesuit order to Mexico in 1816. Brading, *Miners and Merchants*, 128.

<sup>141</sup> Luque Alcaide, *Aránzazu de México*, 302. Gamboa served as rector in 1776-78 and then represented the Mexican Basques again until 1780. "Aránzazu Book of Elections."



The Basque transoceanic community was built on extended family networks.<sup>142</sup> The non-partible inheritance system of the Basque country, in which only one son took over intact the family farmstead, or *baserri*, spawned a tradition of emigration.<sup>143</sup> Sons denied control of the *baserri* often left their native villages. Fortunately, the geography of the Basque region, with its mountains, rivers, coastline, and mineral deposits, gave rise to many alternative pursuits.<sup>144</sup> Basque men became sailors, fishermen, shipbuilders, miners, and metallurgists. Those with the benefit of an education joined the priesthood or royal government in Madrid, tending in the latter towards fiscal administration.<sup>145</sup> Most famously, however, Basques embraced commerce, which many of their fellow Spaniards considered disreputable because of its association with the Jews.<sup>146</sup> Young Basques followed their relatives to Bilbao, Madrid, Seville and all points in the Indies, helping to form a mesh of trading companies that carried out much of Spain's transatlantic trade from the sixteenth to nineteenth centuries.<sup>147</sup>

Religious brotherhoods formed their own transoceanic alliances, adding further tensile strength to the Basque web. Aránzazu formally associated with the Congregación de San Ignacio de Loyola in Madrid.<sup>148</sup> Founded in 1713, San Ignacio was the center of

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<sup>142</sup> For the best account of the transatlantic Basque connections, see Juan Javier Pescador, *The New World inside a Basque Village: the Oiartzun Valley and its Atlantic Emigrants, 1550-1800* (Reno, 2004). See also José María Imízcoz and Rafael Guerrero, "Familias en la Monarquía. La política familiar de las elites vascas y navarras en el Imperio de los Borbones," in *Casa, familia y sociedad (País Vaco, España y América, siglos XV-XIX)*, ed. José María Imízcoz (Bilbao, 2004).

<sup>143</sup> The Basque system did not operate on the basis of primogeniture. Often the eldest son would be passed over for a more able son or even daughter. See Julio Caro Baroja, *La hora navarra del XVIII (personas, familias, negocios, e ideas)* (Pamplona, 1969), 20-25; Pescador, *New World Inside a Basque Village*, xxi-xxii.

<sup>144</sup> Julio Caro Baroja, *Los vascos*, 3 ed. (Madrid, 1972), 195.

<sup>145</sup> Caro Baroja, *Hora navarra*, 60-65.

<sup>146</sup> For a revisionist account of the Spanish attitudes to work see Ruth MacKay, "*Lazy, Improvident People*": *Myth and Reality in the Writing of Spanish History* (Ithaca, 2006).

<sup>147</sup> For a comprehensive study of a family trading network, see Josefina María Cristina Torales Pacheco, ed., *La compañía de comercio de Francisco Ignacio de Yraeta (1767-1797)*, 2 vols. (México, 1985).

<sup>148</sup> AHCV, 006-IV-006, "Decree, November 6, 1729." For the Congregación de San Ignacio see Alberto Angulo Morales, "La Real Congregación de San Ignacio de Loyola de los naturales y originarios de las tres

Basque power in the capital. Its members included Sebastián de la Cuadra, the marqués de Villarias, a key minister under Philip V and reputed “*jefe de los vizcaínos*” in Madrid.<sup>149</sup> Villarias was the patron of Zenón de Somodevilla, the marqués de la Ensenada, the chief minister of Ferdinand VI from 1746 to 1754.<sup>150</sup> Ensenada’s close collaborator, Agustín de Ordeñena, the secretary of the Council of State and rector of San Ignacio, acted as the main go-between for the Basques and the royal administration in the mid-eighteenth century. The congregation believed helping their fellow Basques in America at court was a central part of their mission. Through a special agent, San Ignacio handled the transfer of money across the Atlantic.<sup>151</sup> The number of royal officials who joined San Ignacio upon their return to Madrid after service overseas strengthened its ties to New Spain. At least three of these American veterans, all members of the Council of the Indies, served as rectors of the congregation, Tomás Ortiz de Landázuri in 1766, Francisco Antonio de Echavarri in 1772, and Francisco Leandro de Viana in 1782.<sup>152</sup>

San Ignacio was not the only Spanish brotherhood that rendered assistance to *americanos*. In 1741 a group in Madrid of devotees of the Virgin of Guadalupe, then

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provincias vascas en la corte de Madrid (1713-1896)," in *Los Vascos en las Regiones de México Siglos XVI a XX*, ed. Amaya Garritz (México, 1999); *Noticia del Origen, Fundación, Objeto y Constituciones de la Real Congregación de Naturales y Originarios de las Tres Provincias Vascongadas establecida bajo la advocación del glorioso San Ignacio de Loyola*, (Madrid, 1896). In Madrid, the Basques from Navarre had their own important confraternity, San Fermín. See Caro Baroja, *Hora navarra*, 17-18.

<sup>149</sup> Stanley J. Stein and Barbara H. Stein, *Silver, Trade, and War: Spain and America in the Making of Early Modern Europe* (Baltimore, 2000), 319, n. 26.

<sup>150</sup> *Ibid.*, 236-237.

<sup>151</sup> Angulo Morales, "San Ignacio de Loyola," 15-17. José M. Mariluz Urquijo, "El indiano en la Corte: La Real Congregación de Nuestra Señora de Guadalupe," in *Tres Estudios Novohispanos. Sociedad, Letras, Artes*, ed. Daisy Rípodas Ardanaz (Buenos Aires, 1983), 17.

<sup>152</sup> Echavarri ran afoul of the viceroy Revillagigedo in the late 1740s, who orchestrated his recall to Spain. The board of Aránzazu wrote to San Ignacio in May 1749 to vouch for Echavarri and ask for assistance in securing him a high judicial position in Spain. Echavarri, perhaps through the good offices of the Madrid congregation, returned to New Spain in 1752, his name cleared, and served on the audiencia of Mexico until 1769, when the crown appointed him to the Council AHCV, 005-V-006, "Aránzazu to San Ignacio, May 14, 1749." Burkholder, *Councillors of the Indies*, 36-37; Mark A. Burkholder and D.S. Chandler, *Biographical Dictionary of Audiencia Ministers in the Americas, 1687-1821* (Westport, Connecticut, 1982), 105. On Viana see Burkholder and Chandler, *Biographical Dictionary of Audiencia Members*, 353-354.

perhaps at her apogee as a creole symbol, formed a confraternity in her honor.<sup>153</sup> One of the more influential members was José Banfi y Parrilla, a long-time councillor of the Indies connected to Ensenada.<sup>154</sup> He looked after the sale of government posts in the Indies in the 1740s, and claimed in 1754, when he fell from political grace with Ensenada, to have known everyone who had been posted to America in the previous twenty years.<sup>155</sup> Landázuri and Viana also joined this confraternity upon their returns to Madrid. Gamboa had links to two of its founders, the Veracruz priest Juan de Alarcón, in Madrid in the 1740s to lobby for the establishment of the Colegiata at the basilica of Guadalupe in Mexico City, and Francisco de Berrio, the older brother of Gamboa's school friend. Creoles in Madrid on official business or seeking preferment often joined Guadalupe, Gamboa perhaps among them.

Within the Basque community, the pervasiveness of migration and the robust sense of ethnic singularity reduced the distance between *criollos* and *peninsulares*. This can be seen in representation on Aránzazu's governing board. The *cofradía* treated Mexican-born members as equals to natives of Biscay, Guipúzcoa, Álava, and Navarre.<sup>156</sup> They were entitled to the same number of board seats and served regularly as rectors. Many peninsula-born Basques became devoted to Guadalupe, with two rectors of Aránzazu, Manuel Aldaco and Viana, funding altars in her honor in the parish churches of their native villages.<sup>157</sup> The trust that the board placed in Gamboa to represent their interests in Madrid suggested how Basque blood trumped an American birth. Mexican-based Basques had played a central role in creating the transatlantic Basque identity. It

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<sup>153</sup> See Mariluz Urquijo, "Indiano en la corte."

<sup>154</sup> Stein and Stein, *Silver, Trade and War*, 237.

<sup>155</sup> Burkholder, *Councillors of the Indies*, 16-17; Mariluz Urquijo, "Indiano en la corte," 33; Víctor Peralta Ruiz, *Patrones, clientes y amigos: el poder burocrático indiano en la España del siglo XVIII* (Madrid, 2006), 66.

<sup>156</sup> "Aránzazu Book of Elections."

<sup>157</sup> Mariluz Urquijo, "Indiano en la corte," 37; Pescador, *New World Inside a Basque Village*, 122.

was in New Spain in 1607 that Baltasar de Echave wrote the first grand statement of the divine origin of the Basque language, *Discursos de la antigüedad de la lengua cántabra Bascongada*. The first important paean to the Virgin of Aránzazu, Juan de Luzuriaga's *Paranymphe celeste*, was published in Mexico City in 1686, four years before its appearance in Madrid.<sup>158</sup>

Juan Javier Pescador, in his 2004 study of the interaction between America and the Basque village of Oiartzun, suggested that the transatlantic nexus created an imperial identity.<sup>159</sup> Basques outside of their native regions retained a fierce sense of ethnic pride but also adapted themselves to the larger world. For instance, the Real Sociedad Bascongada de los Amigos del País, the Basque economic society founded in 1764, could simultaneously support the publication of a Basque dictionary, which would establish the primacy of the Basque language, *euskera*, and defend the use of Castilian as the main language of instruction in Basque schools. As the society put it in 1772: "Even though the peculiar language of the country is Basque, that of the Nation is Castilian, and therefore the native tongue of all the Spaniards."<sup>160</sup> To these imperial Basques of the eighteenth century, there was nothing contradictory between local pride, whether in Guipúzcoa or Guadalajara, and their attachment to the Spanish monarchy. The radical nationalism now common in the Basque country had not yet taken hold.

The Basque network helped to diffuse cultural attitudes. Basques were renowned not only for their unity – or snobby insularity in non-Basque eyes – but also their industriousness. The Bourbon dynasty, eager to restore Spain's economic vitality, held up entrepreneurs like Juan de Goyeneche, the founder in 1709 of a model industrial

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<sup>158</sup> Pescador, *New World Inside a Basque Village*, 115.

<sup>159</sup> *Ibid.*, 110.

<sup>160</sup> *Extractos de las juntas generales celebradas por la Real Sociedad Bascongada de los Amigos del País (1771-1773)*, (San Sebastián, 1985), 97:101 (1772).

settlement in Navarre, as models for the nation.<sup>161</sup> Young Basque immigrants to New Spain famously spent long apprenticeships with uncles or older relatives learning the intricacies of overseas commerce. To succeed in a business world ordered by personal rather than institutional relationships, it was necessary to nurture reputations for prudence, discipline, and trustworthiness. The anthropologist Julio Caro Baroja suggested that eighteenth-century Basques exhibited a classic Protestant work ethic.<sup>162</sup>

The Basque community particularly valued education as a means of advancement. A 1775 essay circulated by the Real Sociedad Bascongada, declared with some irony that “in the limited, mountainous and sterile territory of the Basque country, from no other branch of commerce could one extract such profits than the distribution of young men to Andalusia and America, preparing them first with a careful instruction in the use of the pen and arithmetic.”<sup>163</sup> The Basques of New Spain focused their collective philanthropic energies from the 1730s to the 1750s on the construction of a college for girls, indicating the growing appreciation for female education among their ranks.<sup>164</sup> One of the chief promoters of education in New Spain was Gamboa’s friend, Ambrosio Meave, who as a young man helped lead the effort to build the Vizcaínas and as an elder statesman of the community and founder of the Real Sociedad Bascongada in New Spain, collected funds for the economic society’s technical college in Vergara.<sup>165</sup> Gamboa, whose own career

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<sup>161</sup> On Goyeneche see William James Callahan, *Honor, Commerce, and Industry in Eighteenth-century Spain* (Boston, 1972); Caro Baroja, *Hora navarra*, 87-119. In 1783 the crown issued a decree, intended to remove the stigma of manual labor, declaring that certain humble trades were not incompatible with hidalgo status. See Antonio Domínguez Ortiz, *Carlos III y la España de la Ilustración* (Madrid, 1988), 204.

<sup>162</sup> Caro Baroja, *Hora navarra*, 47-52.

<sup>163</sup> *Extractos de las juntas generales celebradas por la Real Sociedad Bascongada de los Amigos del País (1774-1776)*, (San Sebastián, 1985), 122 (1775).

<sup>164</sup> A 1775 discurso circulated by the Real Sociedad Bascongada recognized the need to educate women, if only to assure that their children did not pick up silly superstitions at home. Ibid.

<sup>165</sup> He left this institute twelve thousand pesos in his will. "Elogio póstumo de Don Ambrosio de Meabe," in *Ilustrados en la Nueva España: los socios de la Real Sociedad Bascongada de los Amigos del País* (México, 2001).

success owed much to his rigorous Jesuit schooling, also made important contributions to education in New Spain, advising the board of Aránzazu on the Vizcaínas and organizing the rescue in the 1770s two ex-Jesuit schools for Indians.<sup>166</sup>

### **The Battle over *Las Vizcaínas***

Out of Basque unity came a strong commitment to self-government, epitomized by the *fueros*, or constitutional pacts, that governed the relationships between the Basque provinces and the Castilian crown.<sup>167</sup> Biscay, Guipúzcoa, Álava, and the kingdom of Navarre enjoyed privileges denied to other constituent parts of the Spanish monarchy, at least after Philip V extinguished the distinct legal regimes of the old kingdoms of Aragon. The Basque country enjoyed exemptions from compulsory military service and Castilian import duties. Local assemblies disavowed royal laws they considered contrary to the *fueros*.<sup>168</sup> The Bourbons respected the *fueros* while abolishing the privileges of Catalonia, Aragon, and Valencia, in gratitude for the Basque country's exemplary loyalty during the War of Spanish Succession.<sup>169</sup> Indeed, autonomy and loyalty were, for the Basques, two sides of the same coin.<sup>170</sup> They pushed for the maximum control over their affairs with the argument that it would not detract from their demonstrable loyalty and service to the monarchy. Basques brought this eagerness for self-government to America and instilled it among their creole *paisanos*, as shown in the fight to open the Vizcaínas

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<sup>166</sup> Elisa Luque Alcaide, "Francisco Javier Gamboa y la educación del indígena en México (siglo XVIII)," in *Los vascos en las regiones de México siglos XVI-XX*, ed. Amaya Garritz (México, 1999).

<sup>167</sup> See Fernández Pardo, *La independencia vasca*.

<sup>168</sup> María Estibaliz Ruiz de Azúa y Martínez de Ezquercocha, *Vascongadas y América* (Madrid, 1992), 21.

<sup>169</sup> Ricardo García Cárcel, *Felipe V y los españoles: Una visión periférica del problema de España* (Barcelona, 2002), 33; Tomás y Valiente, *Derecho Español*, 283.

<sup>170</sup> Sánchez-Blanco, *El Absolutismo y las Luces*, 266.

free of episcopal authority. Gamboa acted as Aránzazu's lawyer through this long controversy.

The brotherhood of Aránzazu decided to erect the Colegio de San Ignacio de Loyola for poor girls and women of Spanish descent in the 1730s.<sup>171</sup> Official construction began on July 30, 1734, in the presence of two Basque prelates, Juan Antonio de Vizarrón, archbishop of Mexico and viceroy of New Spain, and Martín de Elizacoechea, bishop-elect of Nueva Vizcaya in northern New Spain.<sup>172</sup> Just as the new college of San Ildefonso, rising in the 1730s a block north of the cathedral, symbolized Jesuit wealth, the Vizcaínas, equally imposing though built on cheaper land in the south of the city, demonstrated to all the power of the Basque community. Construction took almost twenty years, with three merchants, Francisco de Echaveste, Manuel Aldaco, and Ambrosio Meave, leading the fundraising effort. The cost was at least six hundred thousand pesos, comparable to that of San Ildefonso.<sup>173</sup>

Aldaco played the central role. The illegitimate son of a student priest and tavern keeper in Oiartzun, he arrived in New Spain as a teenager in 1715, joining the trading house and silver bank controlled by Francisco de Fagoaga. He married Fagoaga's daughter and inherited the business in 1736. By the late 1730s he was the acknowledged *jefe* of the novohispano Basques, chosen by many as the executor of estates because of

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<sup>171</sup> The college was not so much an educational institution as a shelter and residence for poor Spanish widows and maidens, who were expected to follow rules almost as strict as those in a convent. According to article VII of the constitution of the college, written by Gamboa, the college would not admit "ilegítimas, aunque sean dispensadas, Indias, Mestizas, Mulatas, Negras, ni de otra Nación, sino precisamente Españolas." AHCv, 005-V-007, "Constitution, 1753."

<sup>172</sup> AHCv, 005-V-007, "Gazeta de México, no. 80, 1734." Elizacoechea was related to the powerful Iriarte family of Baztán in Navarra, and, like Basque merchants in Mexico, mentored a nephew sent from Spain, Juan Javier de Iriarte, to follow his career in the church. See Imízcoz and Guerrero, "Familias en la Monarquía," 188; Enrique de Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola, vulgarmente, Colegio de las vizcainas, en la actualidad, Colegio de la Paz* (México, 1889), Doc. 3, Apéndice 21. Vizarrón donated six thousand pesos to the construction.

<sup>173</sup> García, "Sociedad, crédito y cofradía en la Nueva España a fines de la época colonial: el caso de Nuestra Señora de Aránzazu," 56; Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola*, 31.

his business acumen and experience in transferring large sums across the Atlantic. He ran the Fagoaga silver bank, one of the principal sources of capital for the mining industry, and owned mines himself, participating beside Bustamante, Terreros and Valle Ameno in the rehabilitation of Real del Monte in the 1740s. His younger colleague Meave looked after the Fagoaga trading house. Elected as rector of Aránzazu in 1750, Aldaco remained in the post for an exceptional five years, to oversee the completion of the college.<sup>174</sup>

Aldaco entrusted Gamboa with the task of writing the constitution for the Vizcaínas.<sup>175</sup> The second article of this charter, entitled *De la exempción total, y absoluta independencia del Colegio*, stipulated that the rector and board of Aránzazu would administer the institution under the patronage of the king and be subordinate in New Spain only to the viceroy. The members of Aránzazu, who fully financed the project themselves, intended from the start to operate the school exempt from ecclesiastical jurisdiction. Indeed, the provision Gamboa drafted also declared the school free from the authority of the Audiencia, all other tribunals and ministries, and even the Council of the Indies. The constitution read like a Basque fuero, asserting self-government and lay control.

Although there were other independent lay-controlled institutions in colonial Mexico, notably the Hospital de Jesús founded by Hernán Cortés and the Colegio de la Caridad, a school run by the Santísimo Sacramento confraternity, the inspiration for the charter of the Vizcaínas likely came from Basque precedents.<sup>176</sup> At the village or town level, laymen exercised significant influence over local parishes, approving expenditures

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<sup>174</sup> Pescador, *New World Inside a Basque Village*, 84-90. Because Aldaco's father had not yet taken vows at the time of the birth, Aldaco was not deemed a *sacrilego* and thus was able to apply successfully for legitimacy in 1746. See also Brading, *Miners and Merchants*, 120, 176-179.

<sup>175</sup> Josefina Muriel, "Introducción," in *Los Vascos en México y su Colegio de las Vizcaínas* (México, 1987), 26.

<sup>176</sup> Guillermo Porras Muñoz, "La situación jurídica del Colegio de las Vizcaínas," in *Los vascos en México y su colegio de las vizcaínas*, ed. Josefina Muriel (México, 1987).



and even the appointment of priests. This authority, known as the *patronato merelago*, replicated at the local level the king's authority to nominate bishops.<sup>177</sup> The local patronato, which Aldaco's home village of Oiartzun enjoyed, certainly did not reflect any lack of religious devotion amongst the Basques. They were renowned for their devout, even puritanical Catholicism.<sup>178</sup> They believed, however, that in religious as in political matters their proven loyalty justified autonomy in their own affairs.

Even if archbishop-viceoy Vizarrón had given his preliminary approval for the principle of lay control when the first stones were laid, by the time construction ended, a new archbishop, Manuel Rubio y Salinas, occupied the episcopal palace in Mexico City. At a time of eroding ecclesiastical power, he was adamant in protecting the traditional prerogatives of the high clergy, especially the powers of the archbishop of Mexico. He had refused to countenance the autonomy of the new Colegiata de Guadalupe, despite royal decrees sanctioning its exemption from episcopal control. The aspiration of the brotherhood to operate a school free of his jurisdiction represented a remarkably similar challenge, especially since the lawyer for Rubio's opponents in both cases was Gamboa. In September 1751, Rubio notified Aldaco that he would not tolerate Aránzazu's plan to operate the school free of his supervision. He insisted on his right to oversee the school, including the appointment of chaplains and, through the local parish church of Veracruz, the conduct of baptisms and burials. Only a papal order could compel him to accept this derogation of his authority.<sup>179</sup>

The board of Aránzazu refused to buckle under as the canons of the Colegiata had. They were prepared just to offer the archbishop an annual courtesy visit to the school and the payment of compensation to the Veracruz parish church for lost fees for

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<sup>177</sup> Pescador, *New World Inside a Basque Village*, 104-108.

<sup>178</sup> On Basque religiosity see Caro Baroja, *Hora navarra*, 47.

<sup>179</sup> AHCv, 005-V-007, "Rubio to Aldaco, Sept. 20, 1751."

religious services. In a note to Meave in June 1752, after another fruitless exchange of letters with Rubio, Aldaco made clear the extent of his own determination:

...take this to Francisco Xavier de Gamboa and tell him that insofar as it is in my power not another word will be spoken, only to the court and to Rome above all. If we come out of this badly we will then set fire to what has cost us our fortune...<sup>180</sup>

Throughout the controversy, Gamboa advised Aldaco, drawing from his previous experience with the archbishop. He knew the Basques in Mexico City confronted an implacable opponent.

In order to secure royal support, Aldaco and the board of Aránzazu called upon its powerful ally in Madrid, the Congregation of San Ignacio, for assistance.<sup>181</sup> San Ignacio delegated Agustín de Ordeñena, the confidante of Ensenada, to handle the matter.<sup>182</sup> He obtained the support of the chief minister, who in turn secured a royal cédula on September 1, 1753 authorizing the opening of the college according to the exact terms of Gamboa's constitution. The crown would extend its patronage and approve the school's exemption from episcopal jurisdiction. As further proof of San Ignacio's leverage, Ensenada wrote directly to Rubio, in the king's name, demanding his obedience:

...I request and order you very particularly that in respect to the exemptions and prerogatives that the cited board and congregation [Aránzazu] desire and request for the named college...(that) you ratify and enforce in this case the orders that are sent to you through prudent and pious conduct, whose particular service will be very much to my royal pleasure.<sup>183</sup>

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<sup>180</sup> Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola*, CHECK. The note read in full: "Ambrosio: acompaña á ésta la respuesta del S<sup>or</sup> Arzpo., sobre las condiciones que le propuse para el convenio con que su Illma me brindó en otro tiempo; llevará Vm á Fran<sup>co</sup> Xavier de Gamboa, y le dirá que por lo que á mí toca no se ablará más palabra, sino á la Corte, y á Roma por todo, y si saliéremos desluzidos pegarle fuego á lo que nos ha costado nro dinero, á Dios, asta la noche."

<sup>181</sup> AHCv, 005-V-007, "Aldaco to San Ignacio, June 15, 1752."

<sup>182</sup> AHCv, 005-V-007, "San Ignacio to Aránzazu, Jan. 24, 1753."

<sup>183</sup> AHCv, 005-V-007, "Ensenada to Rubio, Sept. 1, 1753." The original: "...os ruego y encargo muy particularmente que respecto a que las exempciones y prerogativos que la citada mesa y congregación desea y solicita para el nominado Colegio...viseis y practiqueis en este caso los oficios que os dictare via prudente conducta y piedad, cuio particular servicio sera muy de mi Real agrado."

Ensenada's personal intervention in the matter was impressive proof of the leverage the Basques in Mexico City could muster at court.

Unequivocal royal backing, however, was not enough to prevail over the archbishop of Mexico. Rubio, protected by distance and confident of his position in canon law, ignored Ensenada's letter.<sup>184</sup> Indeed, he ratcheted up the contest. He directed José Tirso Díaz, pastor of the Veracruz parish, to demand the right to conduct funerals for the college. Meanwhile, the archbishop went after the confraternity itself, demanding the right to audit its accounts and supervise its board meetings. To stave him off, Aránzazu appealed to the viceroy, Revillagigedo, invoking the promise of royal protection contained in its 1729 official charter. Revillagigedo, who had refused to intervene in the Colegiata case, agreed to appoint the veteran oidor, Domingo Valcárcel, to represent him at Aránzazu board meetings. This would manifest royal patronage and ward off the archbishop.<sup>185</sup> Still, in 1755, four years after completion of construction, even with a royal decree approving its opening, the Vizcaínas remained shuttered.

Gamboa was beside Aldaco during these years of confrontation with Rubio. He knew perhaps better than anyone the archbishop's ferocity in defending his prerogatives. The only way forward, Gamboa likely advised, was to secure a papal bull. Once again, in the spring of 1755, the Basques of Mexico City turned to their *paisanos* in Madrid for assistance. They also sent a personal emissary, Gamboa himself. Aldaco wrote a letter of recommendation on his behalf to San Ignacio:

We expect that you will extend to him all the influence in his favor, as our business demands, and for being the son and grandson of a paisano. He knows how to handle himself with the highest honor; and his accomplishments, long

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<sup>184</sup> See Porras Muñoz, "La situación jurídica," 113-124.

<sup>185</sup> Burkholder and Chandler, *Biographical Dictionary of Audiencia Members*, 339. Valcárcel became an intimate friend of Gamboa in the following years, after Gamboa ascended to the Audiencia bench. He served as the head of the crown mercury monopoly in New Spain, and strongly supported Gamboa in the debate over mining reform in the 1770s.

personal experience and most honorable conduct have earned the confidence of this mercantile community, especially our own. He will know how to instruct and inform you up to the latest particulars of our negotiation over San Ignacio.<sup>186</sup>

Gamboa went to Madrid as Aránzazu's liaison in 1755, to monitor the slow and tortuous negotiations in Madrid and Rome to obtain the papal ruling in their favor.<sup>187</sup>

It took Aránzazu sixteen years after construction terminated to open the Vizcaínas. By the time the papal bull was issued in February 1766, after long negotiations in Rome, Rubio had died. His successor as archbishop of Mexico, Francisco Antonio de Lorenzana, was far more willing to accommodate the church to the regalist imperatives of Charles III and would have likely approved the school solely on the basis of the original royal order of 1753. In August 1767, in the tense aftermath of the Jesuit expulsion in June, Lorenzana presided over the opening of the Colegio de San Ignacio de Loyola, named after the founder of the Jesuit order.<sup>188</sup> Remarkably, the school remains in operation today, still administered by a board of Basque businessmen and in the same building constructed by Aránzazu. Along with the national pawn shop, it is one of the few surviving secular institutions in Mexico today founded in colonial times.

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<sup>186</sup> Quoted in Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola*, 64. The original: "Esperamos de V.S. le comunique todo el influjo de su favor, como lo demanda nuestra atención, y el ser hijo y nieto de paisano, que con la mayor honra se sabe manejar; por cuyos méritos y largas experiencias de su persona y de su honradísima conducta, le ha librado su confianza este comercio, especialmente por nuestra parte, y sabrá instruir e informar a V.S. hasta las ultimas menudencias de nuestro negocio de San Ignacio."

<sup>187</sup> AHCV, 005-IV-007, "Inventory of letters, 1824." Unfortunately, I was unable to find the actual letters in the archives of the college. Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola*, 68. Pedro Ramos and Magdalena Rius de la Pola, "Tres momentos en la vida del Colegio de las Vizcaínas," in *Los vascos en las regiones de México siglos XVI-XX*, ed. Amaya Garritz (México, 1999), 110-111.

<sup>188</sup> Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola*, 77. In the following years, the Basques of Aránzazu continued to honor the suppressed Jesuits, adorning the Vizcainas with altars and statues of such Jesuit saints as San Francisco Javier, San Luis Gonzaga, and San Estanislao de Kostka. The school kept alive the memory of the Jesuits during the half-century they were banished from New Spain. Elsa Frost, "La Cofradía de vascos de Nuestra Señora de Aranzazu y su Colegio," *Estudios, filosofía-historia-letras* (Summer, 1986).

## The deputy of the consulado

The economic interests of the Basque merchants paralleled their social and cultural concerns. Just as they invested in schools in New Spain and celebrated the Virgin of Guadalupe, members of the consulado, even though born in Spain, identified their economic well being with the development of the Mexican economy. Their monopoly over external trade, conducted through the fleet system and the Jalapa fair, was not only legally sanctioned by the crown but also arguably worked to the benefit of New Spain's peculiar silver-based economy. The silver pesos produced by the mines served a dual and contradictory function, as domestic currency and leading export. Some mechanism was necessary to safeguard the domestic money supply. Admittedly, the fleet system, like any form of trade protection, tended to limit consumer choice, raise prices, and inflate the profits of participating merchants. Without it, though, unregulated trade would have depleted New Spain's domestic economy of cash.<sup>189</sup> The interest of the merchants of the consulado in protecting their trade privileges, therefore, was not necessarily in opposition to those of the larger economy.

In 1755, the consulado had a number of grievances it wanted to air in Madrid, from the timing of the next commercial fleet departure to the interference of the viceroy in its jurisdiction over trade to the loss of its contract to collect the *alcabala* (sales tax).<sup>190</sup> The merchants elected two deputies to travel to Spain on their behalf, Gamboa, the nominee of the *vizcaínos*, and Francisco de la Coteria, the son-in-law of Manuel de Rivas Cacho, for the *montañeses*.<sup>191</sup> Gamboa went to Madrid therefore as the representative of

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<sup>189</sup> It is worth noting that when open trade finally arrived in New Spain in the 1780s, the Spanish crown found it much easier to extract silver pesos from the viceroyalty. See Richard L. Garner and Spiro E. Stefanou, *Economic Growth and Change in Bourbon Mexico* (Gainesville, 1993), 34; Carlos Marichal, *La bancarrota del virreinato. Nueva España y las finanzas del Imperio español, 1780-1810* (México, 1999).

<sup>190</sup> AGN, AHH, 635-8, "Instructions to the deputies, June 8, 1755."

<sup>191</sup> AGN, Civil, 1332; del Valle Pavón, "Los excedentes del ramo Alcabalas," 985.

both Aránzazu and the consulado, a not unusual arrangement considering the overlap between the two organizations. Aldaco, for example, served as prior of the consulado in the early 1750s, the same time he was directing the affairs of Aránzazu as rector.<sup>192</sup> Although both Gamboa and Cotera signed submissions to the crown, Gamboa surely drafted them, drawing from his extensive experience writing legal briefs. Cotera, a merchant, contributed economic and commercial information. To cover their expenses in Madrid, which might have included gifts to the councillors of the Indies and officials at the Casa de la Contratación, the body supervising overseas trade, the consulado entrusted them with as much as four hundred thousand pesos from the surplus of the alcabala concession.<sup>193</sup>

In their first representation on behalf of the consulado, Gamboa and Cotera asked for a one-year delay in the sailing of the first fleet since the late 1730s.<sup>194</sup> *Registros sueltos*, individual merchant ships licensed by the Casa de la Contratación, had conducted transatlantic trade in the interim. The Mexico City-based merchants claimed they still had excess inventory from the *sueños* and thus a 1756 arrival, as scheduled, would swamp the market. Although they wanted a delay, the deputies of the consulado of Mexico strongly endorsed the fleet system over *sueños*, because of New Spain's mining economy. Given the centrality of silver, as both domestic currency and leading export, Gamboa and Cotera argued the viceroyalty could not sustain free trade. If merchants were forced always to keep silver on hand in anticipation of imports, they would not be able to make necessary

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<sup>192</sup> Borchart de Moreno, *Los mercaderes y el capitalismo en la ciudad de México: 1759-1778*, 239.

<sup>193</sup> del Valle Pavón, "Los excedentes del ramo Alcabalas," 985-986.

<sup>194</sup> AGI, Mexico, 2980, "Memorial de Francisco Xavier Gamboa y Francisco de la Cotera apoderados del consulado de Mexico en Madrid, solicitando en restablecimiento del sistema de flotas; narrando los abusos cometidos por los comerciantes gaditanos en Nueva España, March 21, 1756." The question of the fleet system arose again in the 1780s, with the crown referencing Gamboa's earlier arguments. AGI, Indiferente, 2759, "Sobre las ventajas de practicarse el Comercio de Nueva España por registros sueltos, y no con Comboyes de Flotas," 1783.

long-term investments. Silver mines, for instance, required immense amounts of capital. Gamboa and Cotera claimed that miners owed the two principal silver bankers, Aldaco and Francisco de Valdivielso, the conde de San Pedro del Álamo, close to a million and a half pesos in 1755. It would be better, the deputies suggested, to schedule fleets only once every three years. This would allow mining investments to mature and pesos to circulate more widely throughout the viceroyalty. Everyone would benefit. Consumers and small merchants would be able to transact business in proper coinage, rather than *libranzas* (promissory notes) and *tlacos* (informal monetary tokens). More pesos in circulation would stimulate domestic commerce, agriculture, and even the spread of Spanish civilization. The case Gamboa and Cotera put before the crown recognized that a developing economy needed to control capital flows. The interests of the consulado in a tightly-controlled trade system converged with the interest of sustained development in New Spain. The crown was persuaded, at least, to delay the fleet until 1757.<sup>195</sup>

Having addressed the issue of the fleet, the deputies of the consulado of Mexico turned their attention to the Jalapa trade fair, where the merchants of Mexico City and sales-agents of Cadiz met to transact wholesale business.<sup>196</sup> The consulado wanted stricter enforcement of the 1728 rules governing this marketplace, which Cadiz merchants had repeatedly violated with the alleged connivance of the viceroy Revillagigedo. He had licensed them to travel up-country from Jalapa and set up shop in Mexico City, a clear infringement of the consulado of Mexico's legal monopoly over wholesale trade. The viceroy also usurped the consulado's exclusive jurisdiction over

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<sup>195</sup> AGI, Mexico 2980, Avaria to Arriaga, April 27, 1756. Del Valle Pavón suggests that Gamboa and Cotera may have greased some palms at the Council of the Indies and the Casa de Contratación, the body overseeing ultramarine trade, to delay the fleet. See del Valle Pavón, "Los excedentes del ramo Alcabalas," 991. Equally plausible, however, the merchants of Cadiz might have simply agreed with the Mexicans that trade conditions did not support a sailing in 1756.

<sup>196</sup> AGI, Mexico, 2981, "Representation, June 1757." On the trade fair see José Joaquín Real Díaz, *Las ferias de Jalapa* (Sevilla, 1959).

commercial disputes, appointing his own judges to hear cases. Per their instructions, Gamboa and Cotera sought a declaration from the crown ordering the viceroy “not to take cognizance in any way of the expressed matters, nor appoint judges to hear any or all of them.”<sup>197</sup> Even José de Gálvez, an ambitious official who advocated the abolition of the fleet system and tighter colonial control over New Spain, conceded in 1759 that the consulado of Mexico should be allowed a legal monopoly over the wholesale market in New Spain.<sup>198</sup> The crown agreed, and ordered viceroys to better enforce the rules of the Jalapa market and refrain from interfering in commercial disputes, the province of the adjudicative tribunal of the consulado.<sup>199</sup>

After filing several submissions in the late 1750s with the crown on the outstanding complaints of the consulado on trade, jurisdictional and fiscal matters, Gamboa made one further plea on the merchants’ behalf: he proposed the establishment of a mining bank to be controlled by the prior and consuls of the consulado. He did not submit this as a separate representation but included it in his 1761 *Comentarios a las Ordenanzas de Minas*. The instructions he and Cotera received from the consulado in 1755 made no mention of a bank, suggesting that Aldaco and perhaps other consulado members with large stakes in mining finance communicated the idea confidentially. It was a revolutionary concept, with the potential of transforming the novohispano economy. Historians such as Brading and the Steins have considered the proposal a brazen attempt to extend the consulado’s commercial monopoly over another strategic sector of the Mexican economy.<sup>200</sup> Yet merchants were already neck-deep in mining finance; what Gamboa proposed was the institutionalization of an existing relationship

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<sup>197</sup> AGN, AHH, 635-8, "Consulado Instructions to Gamboa and Cotera, June 8, 1755."

<sup>198</sup> BRP, MS Ayala, II/2816, "Discurso y reflexiones de un vasallo sobre la decadencia de Nuestras Indias," 1759.

<sup>199</sup> del Valle Pavón, "Los excedentes del ramo Alcabalas," 992.

<sup>200</sup> Brading, *Miners and Merchants*, 162-163; Stein and Stein, *Apogee of Empire*, 237.



and the diversification of risk through the incorporation of a joint stock financial company. A chartered bank would have provided a more efficient mechanism to channel capital from where it was accumulating, the safe-boxes of the merchants, to where it was most needed, the silver mines.<sup>201</sup>

Gamboa set out a company prospectus in the *Comentarios*. The bank would be managed by the directors of the consulado, the only men in New Spain, he claimed, with the skills, capital, and integrity to run such an important venture.<sup>202</sup> Showing his admiration for his mercantile patrons, Gamboa asserted that:

The management of the Consulado is beyond the hint of suspicion, from being made up of subjects with intelligence, judgment, maturity, and capital, the last of which they have known how to earn through prudent and well-governed economy, without a note of indecency, as well as from the experience of a century and a half administering the alcabala sales tax.<sup>203</sup>

To capitalize the bank, Gamboa proposed the sale of eight thousand shares at five hundred pesos apiece, to raise a fund of four million pesos. He believed that with the consulado's reputation for sound financial management, religious communities and landowners would want to participate in the stock offering. To further enhance security, he requested three privileges for the bank: a fee of one real for every mark of silver the bank delivered to the mint; the right to import supplies duty-free; and the provision of mercury at cost for the bank's customers. The purpose of the bank, Gamboa made clear,

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<sup>201</sup> Revillagigedo admitted the importance of attending to the merchants of Mexico, who "at the risk of their fortunes, provide the financing for the mines, which is the primary spring that waters trades..." Ernesto De la Torre Villar, ed., *Instrucciones y Memorias de los Virreyes Novohispanos*, 2 vols., vol. 2 (México, 1991), 811.

<sup>202</sup> Gamboa, *Comentarios*, 168-171.

<sup>203</sup> Ibid., 168. Revillagigedo in his instructions praised the integrity of the leaders of consulado, in particular their handling of the alcabala concession: "...pudiendo asegurar...que el manejo de tan cuantioso ramo no ha cedido en particular lucro de los ministros de su administración, ni tampoco tienen fondo común reservado, con lo cual y otras noticias, he inferido la pureza, buena fe y legalidad con que las administran..." De la Torre Villar, ed., *Instrucciones y Memorias de los Virreyes Novohispanos*, 819-820. The fact that they did control a reserve fund from the alcabala of more than a million pesos did not come to light until 1776. See del Valle Pavón, "Los excedentes del ramo Alcabalas," 970.

was to invest primarily in the rehabilitation of old mines with proven reserves that flood waters had rendered inoperable. It would spare miners from having to rely solely on the *aviadores*, local merchant-creditors, whom Gamboa described as “bloodsuckers of the miners, who don’t let go until they have sucked their fill, leaving those miserable miners in search of the vein once again, to produce new blood.”<sup>204</sup>

In 1743 Aldaco, the presumed mastermind of Gamboa’s banking scheme, helped kill a plan for a mining bank proposed by the Italian entrepreneur Domingo Reborato.<sup>205</sup> He claimed then that the idea was unworkable, at least in the hands of Reborato, whom Gamboa described as “Genoese, married in La Habana, and poor, without more capital than his ingenuity, for having lost the little he had in the mines of Sombrerete.”<sup>206</sup> Yet after losing a fortune himself in the flooded Santa Brigida mine at Real del Monte, Aldaco may well have seen the merits of a mining bank. Historian Guillermina Del Valle Pavón suggests as well that the loss of the alcabala concession in 1753, whose surplus the silver bankers on the consulado had long tapped to invest in mines, converted Aldaco from naysayer to enthusiast. He needed a new source of cheap capital.<sup>207</sup>

Gamboa’s plan for a mining bank, tucked into the *Comentarios*, was unacceptable to the crown in the early 1760s. The harshest critic was Campomanes. He recognized that the bank could unduly leverage the power of the merchants of Mexico City to the detriment of Spanish colonialism. He declaimed that a company with access to “all the specie produced by the mines of New Spain would be the most formidable in all of the

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<sup>204</sup> Gamboa, *Comentarios*, 381.

<sup>205</sup> BRP, MS Ayala, 2823, “Proyecto que propone Domingo Reborato y Solar de una Compañía de Minas,” 1743.

<sup>206</sup> Gamboa, *Comentarios*, 149.

<sup>207</sup> del Valle Pavón, “Los excedentes del ramo Alcabalas,” 998.

Monarchy and would impose...the law on the metropole itself.”<sup>208</sup> Campomanes recognized the economic feasibility of the bank and feared its success. A mining bank controlled by the consulado would constitute a powerful engine to increase the economic autonomy of New Spain and make the centralizing reforms of the government of Charles III more difficult to implement. In this sense, Gamboa’s advocacy of the mining bank clearly demonstrated both his own and his mercantile clients’ preference for local autonomy.

## **Conclusion**

The Basque imprint on Gamboa’s thinking is intriguing though difficult to nail down conclusively. He never specifically attributed his ideas to Basque sources. From the beginning of his career, however, he moved in Basque circles, anchored in New Spain in the confraternity of Nuestra Señora de Aránzazu. He became the principal legal advisor to the rich Basque merchants of Mexico City, who controlled Aránzazu and dominated the consulado. For them, he crafted a number of legal and economic arguments, in various controversies, all tending towards the same goal: to expand his clients’ space for autonomous action. In the 1750s, these pleas received a generally sympathetic response from the crown, in part due to the iron-clad connections the Basques, whether in the Indies or Madrid, enjoyed with official power. The notion that autonomy, whether exercised in the lay-control of a school or the management of a chartered mining bank, would buttress rather than weaken loyalty to a higher order was deeply ingrained in Basque thinking. The *fueros* governing the relationships between the Basque provinces and the Castilian crown were the most obvious manifestations of this ideal. Time and

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<sup>208</sup> Pedro Rodríguez Campomanes, "Del beneficio de las minas: si conviene extender la labor de ellas y que para adelantarlas se formen Compañías de viadores," in *Reflexiones sobre el comercio español a Indias* (1762), ed. Vicente Llobart Rosa (Madrid, 1988), 443.

again, this notion of local autonomy within a larger community would appear in Gamboa's writing.

This chapter has also argued that Gamboa's Basque association challenges two deeply-entrenched historiographical notions. First, within the Basque transatlantic community the differences between creoles and peninsulares tended to dissolve. A robust ethnic identity united Basques born on both sides of the Atlantic, creating a more fluid society than most historians of late colonial Spanish America have acknowledged. There was nothing unusual, in these circumstances, for a creole Basque to represent his peninsula-born paisanos at the royal court, or for a proud son of Oiartzun in Guipúzcoa to adorn his old parish church with an altar to the Mexican Virgin of Guadalupe.

Secondly, extending this finding about the weakness of the creole-peninsular divide to the economic sphere, this chapter has argued for a rethinking of the economic interests of the consulado. The peninsula-born merchants in control of New Spain's overseas trade have long been seen by historians as staunch colonialists, ready to put their own and Spain's economic interests before those of the society in which they lived. This view ignores evidence of the convergence between the consulado's concerns for regulated trade and the peculiar needs of the novohispano economy. Consulado merchants like Aldaco, the same Basque who brought the devotion to Guadalupe to his native village, saw the autonomous development of Mexico's economy as the best way to secure their own fortunes. By controlling overseas trade through the fleet system, they would be able to accumulate the capital necessary to fund the viceroyalty's mines, agricultural estates, and even nascent manufacturing. Gamboa's mining bank, presented to the crown in the *Comentarios a las Ordenanzas de Minas* in 1761, might have transformed New Spain's economy, protecting it from any attempt by the Caroline crown to implement a more mercantilist imperial strategy.

## Chapter Four: Gamboa's *Comentarios* and the New Legality

For the law to be in essence law, it has to be honest, just, possible, appropriate to the time and place, necessary, useful, and clear, so as not to induce error for its obscurity, and made not for private convenience but for the common good of all.<sup>209</sup>

*Saint Isidore of Seville, Seventh Century*

### Introduction

As a practicing lawyer, representing a gamut of clients, from miners to religious communities to the consulado of Mexico City, Gamboa argued what would best serve the interests of his clients. The *Comentarios as las Ordenanzas de Minas*, published in 1761 in Madrid, represented a more personal statement of his thinking about law, economics and government. Many of the ideas obliquely sketched in his legal submissions, from the importance of respecting the jurisdiction of the Audiencia to the advantages of local autonomy, he expressed unequivocally in the pages of the *Comentarios*. Although intended primarily as a practical guide to the legal regulation of the mining industry of New Spain, the *Comentarios* is the most complete exposition of the thinking of the most eminent creole jurist of the eighteenth century.

This chapter focuses on the circumstances of Gamboa's composition of the *Comentarios* and the view of law it expounds. Historians have recognized the importance of the text as a window on the colonial Mexican mining industry but have largely neglected its legal ideas. Yet it provides the skeleton key to understanding late colonial legal culture and the politics of reform in New Spain under Charles III. In subjecting the Mining Ordinances of 1584 to learned scrutiny, Gamboa inevitably commented on the

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<sup>209</sup> Isidore of Seville (*Etymologiae*, book V, chapter XXI; seventh century AD). Quoted in Tau Anzoátegui, *Ley en América*, 434-435.

legal system as a whole. He supported the traditional casuistic orientation of *Derecho Indiano*, the broad jurisdiction of the Audiencias, and the discretion of judges and officials to vary royal law when it would cause harm or injustice in light of local conditions. When he wrote the *Comentarios*, in the relative calm of Madrid in the late 1750s, the challenge to this traditional legality was mounting.

Bourbon regalists considered old Spanish legality an obstacle to the economic, administrative and social reform of the Spanish empire. They wanted a more systematic and uniform enforcement of written law, in particular royal statutory law. They criticized how Roman law continued to dominate legal education, which detracted from the respect that lawyers should pay to Spanish law. The Bourbons began this campaign to reform law in Spain itself, extinguishing the separate legal regimes of the old kingdoms of the crown of Aragon. The ministers of Charles III turned their attention to America in the 1760s. Officials like José de Gálvez insisted that the king's law should be enforced as written, without the local variances that often served just to conceal corrupt practices. The Caroline government tended to distrust the old courts, such as the Audiencias, which exercised excessive authority and autonomy. It was better to establish more specialized agencies, such as the Acordada police force and the Mining Tribunal, exempt from Audiencia jurisdiction and more amenable to royal control. It was the attacks on the Audiencia that particularly galled Gamboa, who emerged in New Spain as the most articulate defender of the old legality against the Caroline reformers.

### **Writing the *Comentarios***

Gamboa came to Madrid in 1755 to look after the business of his Basque patrons of the consulado of Mexico and the confraternity of Nuestra Señora de Aránzazu. He also had a personal reason for making the trip. About the only way to win consideration for an

Audiencia post in the 1750s was to be physically present at the royal court.<sup>210</sup> The crown had tightened the selection process at the end of the 1740s to improve the impartiality of judges. It stopped the sale of seats in order to prevent local sons, considered too vulnerable to local elite pressure, from acquiring places on their home Audiencias. Peninsular candidates gained the advantage in the selection process, as they were closer to the decision makers on the *cámara* of the Council of the Indies and obvious outsiders to all American audiencias.<sup>211</sup> Gamboa, a native of Guadalajara but a resident of Mexico City since 1733, hoped for an Audiencia seat, in descending order of preference, in Mexico City, Guadalajara, Guatemala, or – in the worse case – Santo Domingo. Even one of the less desirable postings would put him on the ladder of promotions, making a return to Mexico City possible one day. Gamboa brought with him to Madrid letters of support from the viceroy Revillagigedo, the Audiencia of Mexico, the cathedral chapter of Mexico City, and the city council.<sup>212</sup> Manuel Aldaco recommended the creole lawyer to the members of the Congregación de San Ignacio, the nexus of Basque power in Madrid, and Gamboa likely sought the help as well of the confraternity of Guadalupe, which considered its main mission the assistance of *indianos* at court.<sup>213</sup>

To promote his candidacy, Gamboa decided to write on a subject he knew well from his days as a practicing lawyer in Mexico City, the mining laws of New Spain. A legal commentary would serve several purposes. It would burnish his qualifications before the Council of the Indies. Writing a useful book or policy paper was a common

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<sup>210</sup> Sanciñena Asurmendi, *Audiencia en México*, 40. For a parallel case of a creole aspirant see Mark A. Burkholder, *Politics of a Colonial Career: José Baquijano and the Audiencia of Lima* (Albuquerque, 1980).

<sup>211</sup> Mark A. Burkholder and D.S. Chandler, *From Impotence to Authority: the Spanish Crown and the American Audiencias, 1687-1808* (Columbia, Missouri, 1977).

<sup>212</sup> "Relación de servicios, 1759."

<sup>213</sup> Mariluz Urquijo, "Indiano en la corte."; Olavarría y Ferrari, *El Real colegio de San Ignacio de Loyola*, 64.

tactic for office seekers; his fellow Mexican judge, Antonio Joaquín de Ribadeneyra Barrientos, wrote a legal treatise on the king's patronato over the church, *Manual compendio de el regio patronato indiano*, while seeking appointment a decade earlier.<sup>214</sup> Two of Gamboa's contemporaries, Campomanes and Gálvez, were busy at the same time writing texts to impress the crown.<sup>215</sup> In addition, a practical commentary on the mining law would be of undoubted benefit to lawyers, judges, miners and crown officials. Lastly, a legal commentary could serve as a platform to make economic proposals for the revitalization of an industry in supposed decline.

Gamboa researched and wrote the *Comentarios* at the Colegio Imperial in Madrid, the foremost Jesuit school in the Spanish monarchy.<sup>216</sup> Perhaps old friends from San Ildefonso opened the doors for him. This college housed one of Spain's best libraries and supported an illustrious community of scholars in the late 1750s, including Andrés Marcos Burriel, a pioneer of Spanish paleography and legal history, and Esteban de Terreros, who translated from the French a sixteen-volume compendium of natural history, *Espectáculo de la Naturaleza*.<sup>217</sup> Gamboa received special assistance from Christian Rieger, the Austrian professor of mathematics at the college and cosmographer

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<sup>214</sup> Antonio Joaquín de Ribadeneyra y Barrientos, *Manual compendio de el Regio Patronato Indiano: para su mas facil uso en las materias conducente á la practica* (Madrid, 1755).

<sup>215</sup> The prolific Campomanes apparently caught the royal attention with his study of the geography of Portugal. He also wrote the unpublished, until recently, *Reflexiones sobre el comercio español a Indias* in the early 1760s. Pedro Rodríguez Campomanes and Vicente Llombart Rosa, *Reflexiones sobre el comercio español a Indias (1762)* (Madrid, 1988); Sánchez-Blanco, *El Absolutismo y las Luces*, 79-83. José de Gálvez, at the time the lawyer of the French embassy, wrote in 1759 *Discurso y Reflexiones de un Vasallo sobre la decadencia de Nuestras Indias Españolas*. See Luis Navarro García, *La política americana de José de Gálvez según su "Discurso y reflexiones de un vasallo"* (Málaga, 1998).

<sup>216</sup> Domínguez Ortiz, *Carlos III y la España de la Ilustración*, 279; José Simon-Díaz, *Historia del Colegio Imperial de Madrid* (Madrid, 1952).

<sup>217</sup> Sánchez-Blanco, *El Absolutismo y las Luces*, 73-74. On Burriel see Pedro Sainz Rodríguez, "El P. Burriel, Paleógrafo," in *Evolución de las Ideas sobre la Decadencia Española* (Madrid, 1962); John Thomas Vance, *The Background of Hispanic-American Law* (New York, 1943), 10.



of the Indies.<sup>218</sup> He brought to Gamboa's attention numerous books on mining written in German and perhaps technical works in French as well, such as Jean-Antoine Nollet's six-volume *Leçons de physique experimentale* (1743-64) and Jean Hellot's 1750 translation of Christopher Andre Schluter's 1738 treatise on metallurgy, *Gründlicher Unterricht von Hütte-Werken*.<sup>219</sup> The Jesuits of the Colegio Imperial also entrusted Gamboa with the unpublished papers of José de Zaragoza, the celebrated seventeenth-century mathematician and cosmographer from Valencia.<sup>220</sup> He found a unknown report by Zaragoza on mercury mining in New Spain, which supported his argument that the crown should allow such mining in Mexico.<sup>221</sup>

It was because of the extensive holdings of the Jesuit library that Gamboa was able to pack the *Comentarios* with so much technical information. Miners in New Spain, he realized, had little access to published works on mineralogy and metallurgy, explaining in part their reliance on artisanal practices. Even a text as famous as Georgius Agricola's *De Re Metallica* (1556), a fundamental study of earth sciences, was almost unknown amongst American miners.<sup>222</sup> He summarized in the *Comentarios* Agricola's findings on many points relevant to the mining conditions of New Spain. He also publicized a number of Spanish books on mines and metals, such as Bernardo Perez de Vargas's *De Re Metallica* (1568), Juan Fernández del Castillo's *Tratado de ensayadores* (1623), and Alvaro Alonso de Barba's *Arte de los metales* (1640). Regarding the last one, Gamboa claimed that even "Don Alonso de Barba, curate of Potosí in Peru, (translated as well into German and French, because of the great merit of his work on the Art of Metals) is rare

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<sup>218</sup> Navarro, "Tradition and Scientific Change," 363. Francisco Xavier de Gamboa, *Comentarios a las Ordenanzas de Minas* (Madrid, 1761), 247

<sup>219</sup> Jean Hellot, *De la Fonte des Mines*. Gamboa, *Comentarios*, 7.

<sup>220</sup> On Zaragoza see Navarro, "Tradition and Scientific Change."

<sup>221</sup> Gamboa, *Comentarios*, 31-32.

<sup>222</sup> For an English translation see Georgius Agricola, *De Re Metallica* Herbert Hoover and Lou Henry Hoover trans. (New York, 1986). Agricola was the most cited technical writer in Gamboa's *Comentarios*.

among the miners of New Spain.”<sup>223</sup> Barba was the first to describe the process, invented in the 1550s, to use mercury amalgamation to refine large quantities of silver ore.<sup>224</sup> Gamboa was the first, in the *Comentarios*, to describe eighteenth-century Mexican refining techniques, from smelting in furnaces to the mercury-based patio method.<sup>225</sup>

One of the most important technical works Gamboa drew upon in the *Comentarios* came from New Spain, an unpublished treatise on underground geometry and mine engineering by José Saenz de Escobar, a late seventeenth-century attorney on the Audiencia of Mexico.<sup>226</sup> Gamboa described this work as a “treatise of small size, but of great force and substance, whose information we draw upon for the ordinances concerning the exterior and interior measurement of mines.”<sup>227</sup> The biggest technical shortcoming amongst Mexican miners, in Gamboa’s opinion, was their failure to survey their mines properly. This led to a host of problems: mine shafts that failed to reach ore bodies, tunnels prone to flooding, drainage adits wrongly angled, and workings that crossed claim boundaries. Bad geometry thus led to inefficiency and lawsuits. He proposed that the crown appoint skilled and licensed mining surveyors in each district to assist in the proper design and engineering of mines.<sup>228</sup> In chapter twelve of the *Comentarios*, Gamboa included an extensive technical appendix on subterranean geometry, with tables for calculations and drawings of measuring instruments. Gamboa incorporated in this section much of Saenz’s treatise, remarking that “it will be opportune to condense on this point what was written by a subject so learned, experienced and

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<sup>223</sup> Gamboa, *Comentarios*, Prologue, unpaginated.

<sup>224</sup> Álvaro Alonso Barba, *Arte de los metales; en que enseña el verdadero beneficio de los de oro y plata por azogue, el modo de fundirlos todos y como se han de retinar y apartar unos de otros*. (Madrid, 1640).

<sup>225</sup> Gamboa, *Comentarios*, Ch. XXII, De El Beneficio de los Metales, 384-418.

<sup>226</sup> Elías Trabulse, “Francisco Xavier de Gamboa y sus Comentarios a las Ordenanzas de Minas de 1761,” in *Comentarios a las Ordenanzas de Minas* (México, 1986), 44-46. Saenz wrote three treatises on measurements, on mines, land, and water.

<sup>227</sup> Gamboa, *Comentarios*, Prologue, unpaginated.

<sup>228</sup> *Ibid.*, 236.

applauded in the kingdom of New Spain.”<sup>229</sup> He clearly identified with Saenz, another scientifically-minded creole lawyer dedicated to helping miners.

Gamboa surely found the atmosphere of the Colegio Imperial in the late 1750s intellectually stimulating, but he also probably felt the growing anxiety among the Jesuits. Their enemies were gathering force, encouraged in Spain with the 1754 dismissal of the pro-Jesuit chief minister, Ensenada, and the powerful confessor to the king, the Jesuit Francisco de Rávago. It was known that Charles, the heir to Ferdinand and king of Naples, was unsympathetic to the order. He chose as his chief minister in Naples Bernardo Tanucci, a learned jurist, committed regalist, and outspoken critic of the Jesuits.<sup>230</sup> The community at the Colegio Imperial was shaken in early 1759 when the Marquis of Pombal ordered the Jesuits out of Portugal and its overseas territories.<sup>231</sup> Later that year, when Charles III arrived from Italy, he signaled his sympathy for the Portuguese move, by lending his support for the beatification of Juan de Palafox y Mendoza, the seventeenth-century bishop of Puebla and enemy of the Jesuits.<sup>232</sup>

The arrival of Charles, while cause for concern at the Colegio Imperial, inspired hope in most Spaniards. Patriots looked to the new king and his experienced Italian ministers to revive the stalled Bourbon reform program, which basically sought to bring Spain up to speed with its European rivals.<sup>233</sup> Madrid was abuzz with novel ideas and reform plans in these years. The thriving periodical press reported the latest news from abroad. Tertulias, the classic literary gatherings of Spain, brought together like-minded

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<sup>229</sup> Ibid., 229.

<sup>230</sup> Domínguez Ortiz, *Carlos III y la España de la Ilustración*, 54-56; Sánchez-Blanco, *El Absolutismo y las Luces*, 41-42.

<sup>231</sup> See Kenneth Maxwell, "The Spark: The Amazon and the Suppression of the Jesuits," in *Naked Tropics: Essays on Empire and other Rogues* (New York and London, 2003).

<sup>232</sup> Sánchez-Blanco, *El Absolutismo y las Luces*, 37-42; Stein and Stein, *Apogee of Empire*, 35-36.

<sup>233</sup> For the latest study of the Bourbon reforms, which emphasizes the borrowings from other European countries, see Gabriel B. Paquette, *Enlightenment, Governance and Reform in Spain and its Empire 1759-1808* (New York, 2008).

people to discuss the latest cultural, scientific and economic ideas.<sup>234</sup> In the Basque country, the participants in one tertulia organized the first economic society in Spain in 1764, the Real Sociedad Bascongada de los Amigos del País.<sup>235</sup> Many foreign artists, notably Anton Raphael Mengs and Giambattista Tiepolo, came to Madrid in the early 1760s to glorify the dynamic new Bourbon king.<sup>236</sup>

Gamboa was just one of several writers working at the time on reformist tracts. Miguel Antonio de la Gándara's *Apuntes sobre el bien y el mal de España* of 1759, Bernardo Ward's *Proyecto económico* of 1762, and Campomanes's *Las reflexiones sobre el Comercio español a Indias* of 1762 captured this mood of expectancy.<sup>237</sup> These three authors set out similar plans to stimulate Spain's domestic economy, calling for the reduction of internal trade barriers, the expansion of trade with America, and the suppression of monopolistic guilds, including the consulado of Cadiz. Ward and Campomanes, especially, echoed the program originally set out by José de Campillo in the early 1740s, with Ward even including unattributed sections of Campillo's unpublished *Nuevo sistema*.<sup>238</sup> Gándara, Ward and Campomanes looked to the king to lead the reform effort. Like most Spanish reformers, they supported assertive regalism as the best way to overcome the vexatious rules and institutions that supposedly held Spain

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<sup>234</sup> Sánchez-Blanco, *El Absolutismo y las Luces*, 23-29.

<sup>235</sup> Jesús Astigarraga, *Los ilustrados vascos: Ideas, instituciones y reformas económicas en España* (Barcelona, 2003); Robert J. Shafer, *The Economic Societies in the Spanish World (1763-1821)* (Syracuse, 1958).

<sup>236</sup> See Paquette, *Enlightenment, Governance and Reform*, 2-5.

<sup>237</sup> On these economic writers see Campomanes and Llombart Rosa, *Reflexiones sobre el comercio español a Indias (1762)*; Juan Luis Castellano Castellano, "Bernardo Ward," in *Economía y economistas españoles 3: La Ilustración*, ed. Enrique Fuentes Quintana (Madrid, 2000); Concepción de Castro, "Campomanes, un ilustrado en el Consejo de Castilla," in *Economía y economistas españoles 3: La Ilustración*, ed. Enrique Fuentes Quintana (Madrid, 2000); Miguel Antonio de la Gándara and Jacinta Macías Delgado, *Apuntes sobre el bien y el mal de España* (Madrid, España, 1989); Bernardo Ward, *Proyecto Económico* (Madrid, 1986).

<sup>238</sup> José del Campillo y Cossío, *Nuevo sistema de gobierno económico para América*, ed. Manuel Ballesteros Gaibrois (Oviedo, 1993). On the disputed authorship of the *Nuevo sistema* see Luis Navarro García, "Campillo y el Nuevo sistema: Una atribución dudosa," *Temas americanistas* (1983).

back economically and socially.<sup>239</sup> In contrast, Gamboa did not call for structural reform or aggressive royal action for New Spain. He defended existing institutions and simply presented the case for a series of discrete measures to make the mining industry more productive and efficient. Unlike his Spanish counterparts, he did not perceive his country to be in crisis.

The *Comentarios* received the requisite licenses from the king, the Council of the Indies, and the Inquisition in September and October 1761. The book came out at the end of that year, published by the renowned house of Joaquín Ibarra, recognized as the finest printer in the Spanish world.<sup>240</sup> It was an impressive volume of over five hundred pages, including several plates of illustrations by the artist Juan Minguet, one of the first graduates of the fine arts Academy of San Fernando.<sup>241</sup> Because Gamboa included the prospectus for a mining bank, the consulado paid for its publication, likely out of the surplus alcabala funds.<sup>242</sup>

### **The Mining Ordinances of 1584 and Gamboa's endorsement of *Derecho Indiano***

In the *Comentarios a las Ordenanzas de Minas*, Gamboa meshed the old with the new. A commentary on the laws was one of the oldest genres of juridical literature, rooted in the Roman legal tradition. Gamboa, however, did not analyze Roman law but a royal statute, the Mining Ordinances issued by Philip II in 1584, included as Law 9, Title 13, Book 6 of the *Recopilación de Leyes de Castilla*. Gamboa also combined his classical learning with a pragmatic analytical approach. He acknowledged his intellectual debt to

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<sup>239</sup> Sánchez-Blanco, *El Absolutismo y las Luces*, 23-35.

<sup>240</sup> Marcos Rafael Blanco-Belmonte, *El maestro Ibarra: homenaje que la Casa Gans, al celebrar sus bodas de oro, dedica al gran impresor Joaquín Ibarra* (Madrid, 1931); François Lopez, "El libro y su mundo," in *La república de las letras en la España del siglo XVIII*, ed. Joaquín Álvarez Barrientos (Madrid, 1995).

<sup>241</sup> Trábulse, "Gamboa y sus Comentarios," 24.

<sup>242</sup> del Valle Pavón, "Los excedentes del ramo Alcabalas."

Benito Gerónimo Feijóo, the Benedictine monk who popularized in Spain the empirical thinking of the scientific revolution.<sup>243</sup> Gamboa hailed Feijóo in the *Comentarios* as “our Spanish Savant, who has so enlightened the Nation with his writings.”<sup>244</sup> Most strikingly, in a text that dwelled on the need for miners to adopt more rational and scientific methods, Gamboa vouched for the seemingly archaic and complicated legal system of the Spanish Indies, known as *Derecho Indiano*.

As in his published brief in the Rivas Cacho case, Gamboa canvassed an immense range of classical, historical and even theological authorities in the *Comentarios*.<sup>245</sup> This was part of the juridical game, to showcase one’s erudition. Gamboa wanted to impress the ministers of the *cámara*, or chamber, of the Council of the Indies, who decided on audiencia appointments. On points of law, Gamboa cited predominantly sixteenth and seventeenth Spanish jurists, such as the humanist Diego de Covarrubias, who wrote on numerous issues of civil and canon law, including practical matters of procedure.<sup>246</sup> Gamboa looked often to the authority of Francisco Salgado de Somoza, a prominent seventeenth-century jurist. A representative example concerned the duty of an *apoderado*, or legal representative “not to register in his own name what should be done in the name of the legitimate owner, or minor, or student, as Salgado abundantly establishes.”<sup>247</sup> Other prominent Spanish jurists Gamboa quoted with approval included Juan Larrea Batista, Antonio Gómez, Gregorio López, and Jerónimo Castillo de

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<sup>243</sup> Feijóo wrote two multi-volume collections, the *Teatro crítico universal* (1726-40) and *Cartas eruditas* (1742-1760). For an overview of his role in spreading Enlightenment ideas in Spain, see Richard Herr, *The Eighteenth-Century Revolution in Spain* (Princeton, NJ, 1958), 37-45. In addition, see *Simposio sobre el Padre Feijóo y su siglo*. 2 vols. (Oviedo, 1976).

<sup>244</sup> Gamboa, *Comentarios*, 82.

<sup>245</sup> In one paragraph, describing the ancient mines of Spain, Gamboa cited the Book of Maccabees, Greek writers Aristotle, Herodotus, Posidonius, Polybius, Diodorus Siculus and Strabo, and Roman writers Gaius Julius Solinus, Lucio Anneo Floro, and Pliny the Elder. *Ibid.*, 73.

<sup>246</sup> Tomás y Valiente, *Derecho Español*, 309-310. Gamboa cited Covarrubias most directly on remedies in mining cases. Gamboa, *Comentarios*, 446-453.

<sup>247</sup> Gamboa, *Comentarios*, 113.

Bobadilla. In this sense, Gamboa's *Comentarios* did not offend those Spanish legal reformers who insisted that Spanish lawyers stick to national law and national juridical authorities.

The jurists he cited most often were his fellow commentators on royal law in the Indies, especially Solórzano. This Spanish jurist, who spent his early career in the viceroyalty of Peru as an Audiencia magistrate and inspector of the Huancavelica mercury mine, wrote the bible of Spanish law in America, *Política Indiana*, published in 1647.<sup>248</sup> Gamboa scoured this book and its Latin-language predecessor, *De Indiarum Iure*, for references to the treatment of mining under Peruvian law. For example, Gamboa cited Solórzano on the question of whether the crown had retained its historic rights to subsoil minerals in America: "Don Juan de Solorzano establishes the same sovereign right, not only in Spain but in the Indies, with attention to the Cedula of the Catholic Monarchs and other supporting decrees on the liberty to look for mines while paying the quinta."<sup>249</sup> Gamboa cited Solórzano on the prohibition on priests working mines in the Indies: "The same is strictly proscribed by the *Ley de Indias* [referring to Law 4, Title 12, Book 1 of the Recopilación] and Solorzano as well includes many prohibitive cédulas, on account of the greed, cruelties, and vexations that are experienced in the handling of mines."<sup>250</sup> Gamboa's focus rarely strayed from mining law and thus he had no occasion to cite Solórzano on more general principles, such as the enforceability of written law or the rights of creoles to hold high offices in the Indies. He kept the same narrow focus on other Spanish American juridical authorities as well, such as the

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<sup>248</sup> Solórzano Pereyra, *Política Indiana*. On Solórzano see Enrique García Hernán, *Consejero de ambos mundos: vida y obra de Juan de Solórzano Pereira (1575-1655)* (Madrid, 2007); Malagón Barceló and Ots y Capdequí, *Solórzano y la Política indiana*.

<sup>249</sup> Gamboa, *Comentarios*, 15-16. Gamboa argued against the position of Matías de Lagüñez, a seventeenth-century Spanish jurist and audiencia magistrate in Lima, that the crown did not have the same sovereign right to minerals that it did in Spain.

<sup>250</sup> *Ibid.*, 21-22.

*Gazophilacium regium perubicum* of Gaspar de Escalona y Agüero, a comprehensive study of Peruvian fiscal administration.<sup>251</sup> The *Comentarios* was a practical manual for miners and lawyers, not a work of legal philosophy.

Gamboa's first task, as in any legal commentary, was to decipher a complex and important body of law. He had the obvious advantage, as he put it, of "many years as a lawyer practicing at the Audiencia of Mexico, handling the most bitterly-fought lawsuits over mines of the main districts of that kingdom."<sup>252</sup> The difficulty of interpreting the mining laws began with the fact that the 1584 Ordinances did not revoke the earlier ones of 1567. This was a common problem in Spanish law, since old legislation remained on the books and the king generally issued laws in response to particular situations, without necessarily taking into account earlier laws enacted in similar instances. Only in cases of direct conflict was the 1584 law preferred.<sup>253</sup> In addition, subsequent legislation in the forms of *cédulas* and orders, modified the application of certain provisions. Lawyers would have to consult *cedularios*, collections of decrees compiled on the initiative of jurists.<sup>254</sup> These were not always easy to find. Gamboa counted himself lucky to have a *cedulario* rescued from the 1692 fire that ravaged the viceregal palace in Mexico City.<sup>255</sup> Lesser forms of legislation, such as royal orders and viceregal bandos, also amended the governing law.

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<sup>251</sup> For a brief overview of juridical writing on Derecho Indiano up to and including Gamboa, see Bernardino Bravo Lira, "La literatura jurídica indiana en el barroco," *Revista de Estudios Histórico-Jurídicos* X (1985), especially 231-242.

<sup>252</sup> Gamboa, *Comentarios*, Prologue, unpaginated.

<sup>253</sup> Ord. 1. Ibid., 1-7.

<sup>254</sup> Gamboa relied heavily on a collection produced by Juan Francisco de Montemayor de Cuenca, a seventeenth-century oidor on the audiencia of Mexico. Ibid., 21. On Montemayor's role in repressing an Indian rebellion in southern New Spain in 1660 see Cañeque, *The King's Living Image*, 234-236; Owensby, *Empire of Law*, 256-280.

<sup>255</sup> Gamboa, *Comentarios*, 84.



In Derecho Indiano, however, royal statutory law – whether general ordinances or particular decrees – was never absolute. It was just one of several normative sources, including municipal law, common law (the Roman law of the *Partidas*), canon law, custom, equity, and even Christian dogma, which lawyers and judges drew upon to make legal arguments and decide cases. To be sure, the Ordenamiento de Alcalá in 1348 declared that the king's written law was at the top of the hierarchy of sources, followed by the laws of towns, or *fueros municipales*, and then the *Partidas* as a supplement.<sup>256</sup> It was difficult, however, to control recourse to other sources of law in the old regime, before the articulation of a centralized, bureaucratic state monopolizing lawmaking and adjudication. In the Spanish world, an array of institutions – royal councils, the nobility, the church, town councils, audiencias, and even trade guilds – each endowed with jurisdiction over particular fields, shared and competed for power. The king was indisputably the head of the realm but never in complete command and, in certain circumstances, his laws could legitimately be disregarded by lesser authorities.<sup>257</sup>

In America the supremacy of royal law was more circumscribed than in Spain. The distance from Madrid and the distinctiveness of local conditions gave the king no choice, if he wanted to preserve his image as a just ruler, to allow his representatives overseas discretion in the enforcement and interpretation of law. This delegation of power to local officials was clearly acknowledged by Philip III in 1602, in reference to the recently promulgated Mining Ordinances:

...the viceroys of the Indies should communicate with persons knowledgeable and experienced in the mining laws of our kingdoms of Castile, and if these persons find the laws suited to such kingdoms, especially in that they do not conflict with particular measures already taken in these provinces, the viceroys should conserve, practice and enforce the laws; and that the viceroys should report to us

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<sup>256</sup> Tomás y Valiente, *Derecho Español*, 242-244.

<sup>257</sup> See the discussion about the colonial state in Cañeque, *The King's Living Image*, 4-10.

in detail about which laws are not enforced in each province, and the cause thereof, as well as the reasons for maintaining the laws considered necessary.<sup>258</sup>

This quotation neatly captured the flexible quality of royal law in America. The crown sanctioned changes on the ground. After 1614, royal law made for Castile no longer applied automatically in America; the Council of the Indies first screened it, to ensure it was appropriate for the distinct reality across the Atlantic.<sup>259</sup>

The difficulty in apprehending conditions across the ocean accentuated the casuistry of Spanish law.<sup>260</sup> The Spanish legal system was oriented towards the solution of concrete cases, not the elaboration of general rules. Judges exercised broad discretion in individual cases, seeking equitable over legalistic outcomes.<sup>261</sup> To arrive at a just determination for a particular matter could require the circumvention of written law. Solórzano recognized the danger of granting magistrates in distant parts too much freedom, arguing that it was “much more desirable that they judge according by written laws, and that they be tied to these, and only in matters of little consideration and importance should their discretion be free.”<sup>262</sup> It was not always possible, however, to enforce the letter of the law, since circumstances varied so widely over time and space.

The casuistic approach to law was present not just in adjudication but in lawmaking. The Council of the Indies, for example, tended to issue narrow directives in response to specific problems, rather than general statutes applicable everywhere. Because conditions were novel and mutable, lawmakers issued a torrent of legislation

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<sup>258</sup> Quoted by Gamboa, *Comentarios*, 4. The original: “Que los Virreyes comuniquen con personas inteligentes, y experimentadas las Leyes de Castilla, tocantes a Minas; y si se hallaren convenientes, las hagan guardar, practicar, y executar en las Indias, como no sean contrarias a lo especialmente prevenido para cada Provincia: y hagan la relacion conveniente de las que se dexan de cumplir, y por qué causa, y las razones que huviere, para mandar que se guarden las que tuvieren por necessarias.”

<sup>259</sup> Tau Anzoátegui, *Ley en América*, 30.

<sup>260</sup> On casuistry in Spanish and Spanish American law, see Tau Anzoátegui, *Casuismo y sistema*.

<sup>261</sup> See especially Cutter, *Legal Culture of Northern New Spain*.

<sup>262</sup> Solórzano Pereyra, *Política Indiana*, V, XVI, 6.

during the colonial period. Lawyers, judges and officials had to make sense of this agglomeration of frequently inconsistent rescripts. Often, laws were unenforced not because local officials neglected their duty but because they had not been informed of the existence of laws.<sup>263</sup> To help bring some order and certainty to this jumble, the crown encouraged the compilation of existing laws into a single text. The task was completed in the 1630s by Antonio León de Pinelo and Solórzano. The crown, however, failed to authorize the *Recopilación de las Leyes de los Reynos de las Indias* until 1680.<sup>264</sup> It was thus out-of-date upon publication.<sup>265</sup> Yet lawyers and officials continued to use the *Recopilación* throughout the eighteenth century, as a guide to the basic laws of the Indies. They still had to cope with the flurry of Bourbon laws, which kept the legal landscape crowded and difficult for all but legal specialists to navigate.

The Mining Ordinances of 1584 was a classic example of a royal statute transformed by local officials to suit conditions not contemplated by the lawmaker. The law assumed a much thicker government presence than what in fact existed in New Spain. For example, it set out a complicated system of royalties, which would have required government mine inspectors to assess ore grades at the mine head.<sup>266</sup> The solution adopted in New Spain was simply to charge miners uniform rates based on the quantity of metal produced, first twenty per cent (*quinta*) and then, in the eighteenth century, ten per cent (*diezmo*), which eliminated the need for trained mine inspectors.<sup>267</sup> The law also provided for government-owned refining facilities. Officials in New Spain, however, allowed private miners to process their own ore, to save the investment in

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<sup>263</sup> Tau Anzoátegui, *Ley en América*, 14.

<sup>264</sup> Tomás y Valiente, *Derecho Español*, 341-343; Vance, *The Background of Hispanic-American Law*, 161.

<sup>265</sup> See especially Víctor Tau Anzoátegui, "Consideraciones sobre la aplicación de la Recopilación de 1680," in *La ley en América Hispana del Descubrimiento a la Emancipación* (Buenos Aires, 1992).

<sup>266</sup> Ords. 3-15. Gamboa, *Comentarios*, 83-90.

<sup>267</sup> *Ibid.*, 83-84.

crown refineries.<sup>268</sup> The crown found it could exert sufficient control over the industry through its monopoly over the distribution of mercury, a necessary additive in the chemical refining process. The 1584 statute was silent as well on the issue of mercury.

The numerous discrepancies between the text of the 1584 Ordinances and how the law was enforced did not perturb Gamboa. He may have revered written law, equating the *Recopilación* throughout the *Comentarios* with the *Leyes*, but he understood that what mattered was obedience to the spirit of the law, not its letter. It was the role of jurists to interpret law in light of the intentions of the legislator and the conditions of the locality. In the case of the Ordinances, Gamboa identified its spirit, or *mente*, as the promotion of individual enterprise in the discovery and exploitation of mineral resources. As he wrote apropos the freedom to prospect:

All of this fits well with the principal objective, to encourage the labor of the mines, and to excite the vassals to make discoveries in the public benefit, of both the Royal Treasury and the subjects themselves.<sup>269</sup>

Although the crown was the ultimate owner of subsoil minerals, it delegated the work of mining to private individuals, either separately or in companies.<sup>270</sup> The 1584 Ordinances broadened private rights guaranteed under the common law, the Roman law encoded in the *Partidas*. It allowed individuals, for instance, to enter another person's property in search of mineral deposits, making them liable only for the surface damage caused by their prospecting.<sup>271</sup> They could even register a claim on land in someone else's possession, though presumably this right strongly motivated property owners to search

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<sup>268</sup> Ords. 60-75. *Ibid.*, 384-394.

<sup>269</sup> *Ibid.*, 187. The original: "Todo esto se acomoda bien el objeto principal de que se aliente la labor de las Minas, y se excitan los Vassallos a los descubrimientos en beneficio público de el Real Erario, y de los mismos subditos."

<sup>270</sup> Ord. 2. *Ibid.*, 10-25.

<sup>271</sup> Ord. 16. *Ibid.*, 93. This provision accorded with the traditional notion that ownership entailed the responsibility to use land productively for the good of the community. See Owensby, *Empire of Law*, 90-129.

their own land before an interloper could take advantage. Miners could also follow a vein from their own claim into an adjacent property, since, as Gamboa put it, “the one who digs deeper, following the metal, enjoys everything he extracts from another’s claim, for having acquired and gained it in the effort put into excavating more than his neighbor.”<sup>272</sup>

In exchange for these extensive liberties, miners were obliged first to register their claims at the local treasury office within twenty days of discovery. Gamboa emphasized the vital importance of registration, as “the mine that is worked without being registered is not a mine nor deserves such a name, even if it yields good metals.”<sup>273</sup> Miners also had the responsibility to stake out their registered claim and begin digging a main shaft within twenty days.<sup>274</sup> To assure production, if owners failed to keep at least four men employed on site without an interruption of more than four months, they could lose valid title. Any person could register an abandoned mine.<sup>275</sup> Gamboa argued that all of these property rights provisions of the Ordinances – the wide freedom to prospect, the requirement to register and measure claims, the duty to work claims actively – served the spirit of the law to promote private enterprise in the interest of the wider public and the crown. The king, as the ultimate owner of all underground minerals, wanted to incentivize his subjects to work them, in order to maximize income from royalties and other mining taxes.

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<sup>272</sup> Ord. 30. Gamboa, *Comentarios*, 285. The original: “...el que profundare mas, siguiendo metal, goce de todo el que sacare de pertencia agena, por averlo adquirido, y ganado en la diligencia que puso en ahondar mas que su vecino...”

<sup>273</sup> Ord. 7-9. Ibid., 108. The original in full: “Pues la Mina, que se trabaja sin estar registrada, no es Mina, ni merece semejante nombre, aunque rinda buenos metales. Las Ordenanzas solo llaman Minas las registradas, por ser el Registro el titulo fundamental; y porque la Mina sin Registro, no es otra cosa, que una reprobada ambicion, para extraviar metales, y Platas contra el derecho se S.M. y para impedir el de los Vassallos, que pueden tomar Minas en el mismo lugar, o veta.”

<sup>274</sup> Ords. 22. Ibid., 182-192.

<sup>275</sup> Ord. 37. Ibid., 322-340.

The most glaring disjuncture between the law as written and the law as applied concerned adjudication. The Ordinances mandated the creation of a separate judicial system for miners. Local mine administrators would hear cases at the first instance, with appeals handled by a General Administrator. These judges would exercise exclusive jurisdiction over all mining lawsuits. Ordinance 77 stipulated that “all other justices whatsoever in these our kingdoms shall not interfere with the cognizance of such cases touching or concerning the aforesaid mines.”<sup>276</sup> In other words, the law expressly barred the Audiencias from mining cases. To which Gamboa remarked:

This Ordinance is not in practice in the Indies, nor could be enforced, without notable injustice to the Public, especially the miners, who would have to maintain the cost of the General Administrator of Mines, and the deputies in each region and mining district. The exclusive jurisdiction would not influence the speed of miners’ lawsuits, as we have seen in other situations; and if there were no appeal to the audiencias, injustices would remain unremedied and the parties would be defrauded of their natural right to a defense.<sup>277</sup>

The crown had not established the special mining court in New Spain laid out in the statute. Out of necessity, the Audiencia assumed jurisdiction, with the full acquiescence of viceroys and the Council of the Indies and, according to Gamboa, in the greater interests of justice.

Gamboa thought the whole idea of a separate mining tribunal misconceived. Yet support for it apparently survived in the mining community, as a presumed remedy for the expense and sluggishness of litigation. For this reason, he felt compelled to defend the Audiencia’s jurisdiction. He said the high courts of Mexico City and Guadalajara

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<sup>276</sup> Ord. 77. *Ibid.*, 465.

<sup>277</sup> *Ibid.*, 467. The original: “Esta Ordenanza no esta en practica en Indias, ni podria reducirse a ella, sin notable agravio de el Público, especialmente de los Mineros, que mantendrian a su costa Administrador General de Minas, y Particulares en cada Partido, y en cada Asiento de ellas. La Jurisdicción privativa no influiría en la brevedad de las causas de los Mineros, como lo vemos en otras classes; y si no huviesse Apelación a las Audiencias, quedarian los agravios sin remedio, y defraudadas las Partes de la defensa natural.”

“complied with their obligation exactly,” dispatching appeals quickly and in conformity with the law. Delays occurred mostly because of the unavoidable complications of mining litigation and the remoteness of many mines.<sup>278</sup> His main recommendation to improve the adjudication of mining lawsuits was that the crown select men with some prior knowledge of the industry as local judges in mining districts.

A specialized mining court was only a potential threat when Gamboa wrote the *Comentarios*; the more immediate challenge to the jurisdiction of the audiencias came from the meddling of viceroys. In 1752 Revillagigedo incorporated the mining boomtown of Bolaños as a separate *corregimiento*, or municipality. Two years later, claiming that it was impossible “to achieve the advancement of the mines, keeping things in the state that they are, without applying an extraordinary measure proceeding from my superior government and authority,” the viceroy separated Bolaños from the jurisdiction of the Audiencia of Guadalajara and placed it under his personal control.<sup>279</sup> Revillagigedo alleged that the Audiencia had failed to resolve disputes swiftly and fairly. He appointed his brother-in-law as corregidor, which led to accusations of self-enrichment.<sup>280</sup> His successors, the marqués de las Amarillas and the marqués de Cruillas, retained Bolaños as a special fief of the viceroy, despite unequivocal law instructing viceroys to leave the jurisdiction of mining to the ordinary courts headed by the Audiencias.<sup>281</sup>

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<sup>278</sup> Ibid., 375, 467-468.

<sup>279</sup> "Decree of Nov. 7, 1754 (Revillagigedo)," in *Instrucciones y memorias de los virreyes novohispanos*, ed. Ernesto De la Torre Villar (Mexico, 1991), 849. On the avarice of Revillagigedo see Roberto Moreno, "Un eclesiástico criollo frente al estado borbón," in *Indice de las Gacetas de Literatura de México de José Antonio Alzate y Ramírez*, ed. Ramón Aureliano, Ana Buriano, and Susana López (México, 1979), 14.

<sup>280</sup> BRP, MS Ayala, II/2824, "Noticia de los Minerales de Oro y Plata que contienen las Provincias de el Reyno de la Nueva España, con expresión de los nombres de las Minas principales, y de el estado, en que actualmente se hallan," Feb. 1, 1764.

<sup>281</sup> Gamboa, *Comentarios*, 470. Gamboa cited laws 35, 37, 38 and 60 of title 3, book 3 of the *Recopilación*; laws 34 and 35 of title 15, book 2; and law 24, title 12 and book 5. He also cited chapter 3 of book 4 of Solórzano's *Política Indiana*.

In condemning viceroys' interference in mining disputes, Gamboa used the opportunity to set out his general thinking on the need for a separation of powers in government:

...As the supreme head of the kingdom, and representing the majesty of our sovereign, it is his duty to allow the other members of the body politic, and the tribunals appointed for the determination of questions of justice, to perform their functions without restraint. And he must not, by transgressing the proper limits of his jurisdiction, and assuming authorities which belong to other ministers, disturb the harmony and subordination which ought to exist in the functions of the different officers of the state, at the same time, in so doing, violating the laws (which are supreme above all), and working great injustice to the parties concerned.<sup>282</sup>

Gamboa believed in the supremacy of royal over ecclesiastical authority, as shown in the Colegiata de Guadalupe and Vizcaínas cases he argued against the archbishop Rubio y Salinas. Yet within the royal sphere, he supported a division of powers, with the courts, as representatives of the king in matters of justice, functioning freely from the interference of the political authorities, such as the viceroys.<sup>283</sup>

In a practical text on mining law, Gamboa did not comment extensively on wider matters of policy and government. He made clear, nevertheless, his endorsement of the existing legal order of the Indies. He did not fret over the tangle of legislation issued for the Indies; he showed in the *Comentarios* that a smart and experienced lawyer could cut through the thickets to find coherence. In defending the jurisdiction of the ordinary courts over mining cases, he implicitly argued that the best way to reduce jurisdictional politics and promote the administration of justice was to fortify the authority of the judiciary. At the root of his thinking was a traditional conception of law, which he expressed by quoting from a 1727 report commissioned by the viceroy, the marqués de Casafuerte, on the legitimacy of the mercury monopoly:

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<sup>282</sup> Ibid., 471.

<sup>283</sup> See Cañeque, *The King's Living Image*, 57-65.



...The prince is always beholden to what is honest, just, possible, convenient, necessary, and useful in the welfare of his vassals, which are the constitutive requisites of Law: although the prince can do everything, he can only do what is just; although much might be licit to his power, not everything that is licit is honest, decent, or decorous to his Sovereignty: although he can abrogate Law, he cannot take away rights already acquired by his vassals, without proven cause, sanctioned by justice, and for no reason less powerful, necessary, and advantageous than the universal welfare and prosperity of his subjects, the true object of kingship.<sup>284</sup>

This understanding of law harkened back to the definition given by Isidore of Seville in the seventh century.<sup>285</sup> Because the king's primary duty was to look after the welfare of his vassals, a law that did not serve this purpose theoretically lost its normative force. The validity of law depended on its intrinsic qualities, not the legitimacy of the lawmaking authority. Solórzano, a proponent of stricter enforcement of royal law, conceded that even though the king "always presumed to wish only that which is appropriate," sometimes he failed. The viceroys, in such cases, could suspend the execution of royal orders.<sup>286</sup> This view of law took root in the New World. It empowered officials, especially the judiciary, to police the internal integrity of law and set aside written provisions that failed to address local conditions

Gamboa did not mention the most famous device to circumvent written law in the Spanish legal system, the declaration of *obedecer pero no cumplir*. This allowed lower authorities, such as viceroys and cabildos, to set aside legislation that lacked the constitutive requisites of law. Historians have both exaggerated the use of this device and misunderstood its significance.<sup>287</sup> Recognized in the *Partidas* and the *Recopilación*, *obedecer pero no cumplir* required that the entity refusing compliance had to provide

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<sup>284</sup> Gamboa, *Comentarios*, 39.

<sup>285</sup> See especially Tau Anzoátegui, *Ley en América*, 32-38.

<sup>286</sup> Solórzano is quoted in Cañeque, *The King's Living Image*, 18.

<sup>287</sup> Alan Knight, for instance, refers to *obedecer pero no cumplo* as the famous motto of colonial government, a common exaggeration. See Alan Knight, *Mexico: the Colonial Era* (Cambridge, UK, 2002), 61.

written reasons in a procedure known as a *recurso de suplicación*. It was not an appeal but a motion seeking reconsideration of the law. The crown could respond by amending its original law, leaving it unchanged, or simply suspending it. Rather than exemplifying colonial disregard for the law, *obedecer pero no cumplir* screened out inappropriate or poorly designed laws that could bring the administration of justice into disrepute. It sought to uphold the ideal of the king as the defender of the welfare and prosperity of his subjects.<sup>288</sup>

### **The Bourbon attack on traditional legality**

Gamboa's *Comentarios* of 1761 was one of the last published commentaries on royal law in the Indies. The tide was turning against juridical commentaries and the legality they embodied. As the "enlightened" character in José Cadalso's 1774 novel, *Cartas Marruecas*, put it:

It seems to me that each new writer of laws is an infringer of them. It is as much a crime to comment on them as to break them. Commentaries, interpretations, glosses, notes, etc. are usually so many tricks of courtroom battle. If it were up to me, they should prohibit all new work in this vein for this simple fact.<sup>289</sup>

Indeed, the crown had already started to turn against legal commentaries when Cadalso wrote, ordering jurists to refrain from commenting on the new military ordinances of 1772. Only the king should have the right to interpret this law. Four years later, in 1776, when José de Gálvez, the new minister of the Indies, convened a committee to begin to overhaul the *Recopilación* of 1680, the crown expressly banned all further published

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<sup>288</sup> It did not apply to either judicial rulings or laws of general application, such as the 1584 mining ordinances. See Cañeque, *The King's Living Image*, 56; Góngora, *Colonial History of Spanish America*, 74-78; Hoberman, "Hispanic American Political Theory as a Distinct Tradition," 212-214; Phelan, "Authority and Flexibility," 47-65; Víctor Tau Anzoátegui, "La ley 'se obedece pero no se cumple.' En torno a la suplicación de las leyes en el Derecho indiano," in *La Ley en América hispana del Descubrimiento a la Emancipación* (Buenos Aires, 1992), 67-143.

<sup>289</sup> Cadalso, *Cartas Marruecas*, 68.

commentaries on the Law of the Indies.<sup>290</sup> The attack on commentaries was part of a comprehensive campaign against traditional Spanish legality that heated up during the reign of Charles III.

Driving this movement was Bourbon regalism, which advanced on several fronts over the course of the eighteenth century.<sup>291</sup> First, the new dynasty extended Castilian statutory law throughout Spain as a means to cement its hold on power. During the War of Spanish Succession, Philip V ordered the suppression of the distinct legal regimes of the kingdoms of Aragon, which supported the Habsburg pretender to the Spanish throne. In 1716, capping off this effort, the crown decreed the *Nueva Planta* for Catalonia, which reorganized the principality politically, imposing Castilian public law and institutions.<sup>292</sup> Although the Bourbons brought from France a certain sympathy for royal absolutism, making Castilian public law applicable throughout Spain had been in the minds of Spanish kings since at least the early seventeenth century, when the Count-Duke of Olivares recommended it to Philip IV.<sup>293</sup> The only region that retained separate laws was the Basque country. The new dynasty reluctantly respected the historic *fueros* because of the support the Basques lent them during the war. Yet even Basque legal autonomy was not safe later in the century.<sup>294</sup>

The main target of Bourbon regalists was the power of the Catholic Church, the age-old competitor to royal authority. To buttress the royal case before negotiations began with Rome over a new concordat, in the early 1750s Ensenada instructed scholars to scour the Spanish archives in search of documents to substantiate the claim that the

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<sup>290</sup> Tomás y Valiente, *Derecho Español*, 343-344.

<sup>291</sup> See Paquette, *Enlightenment, Governance and Reform*, 6-7, 20. I agree with Paquette's expansive notion of regalism and its centrality to the Bourbon ideology of governance.

<sup>292</sup> José Sánchez-Arcilla Bernal, *Manual de Historia del Derecho* (Madrid, 2004), 487-501.

<sup>293</sup> J.H. Elliott, *Imperial Spain, 1469-1716* (London, 1963), 329; García Cárcel, *Felipe V y los españoles: Una visión periférica del problema de España*, 86-119.

<sup>294</sup> See Fernández Pardo, *La independencia vasca*.

king's patronato over the church was inherent in royal sovereignty and not a concession from the pope. Andrés Marcos Burriel, the Jesuit of the Colegio Imperial, tackled the archives of Toledo; Campomanes went to El Escorial, and produced a manuscript, *Tratado de la regalia de España*, which asserted the divine right of the king to oversee the church.<sup>295</sup> In 1753, the crown and the papacy reached a new concordat, which gave the crown the same right to nominate bishops and other high ecclesiastical officers in Spain that it enjoyed in Spanish America. As part of the same effort to control the church, at the local level, the crown moved against the semi-autonomous regular orders. This campaign climaxed in 1767 with the expulsion from the Spanish empire of the richest and most independent of the regular orders, the Jesuits. Campomanes, then the fiscal of the Council of Castile, penned the indictment against the Company. He singled out, without credible evidence, the priests of the Colegio Imperial for inciting the Madrid popular riots of March 1766, which almost toppled Charles III and led to the dismissal of his Italian chief minister, the marqués de Esquilache.<sup>296</sup>

The Bourbon desire to reinforce royal power prompted criticism of the legal order, specifically the continuing recourse to Roman law, as embodied in the *Partidas*.<sup>297</sup> The prestige of Roman law, it was feared, overshadowed the legislation of the Spanish king. Bourbon critics also believed it gave jurists too much liberty, as they developed the habit of interpreting all law, not just the legal doctrines of the Romans. In 1713 the crown reiterated the supremacy of national law in the hierarchy of legal sources, as set out

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<sup>295</sup> Magnus Mörner, "The Expulsion of the Jesuits from Spain and Spanish America in 1767 in Light of Eighteenth-Century Regalism," *The Americas* 23 (October 1966, 1966): 160; Sánchez-Blanco, *El Absolutismo y las Luces*, 45-47; 80-82.

<sup>296</sup> José Miguel López García, *El Motín contra Esquilache: Crisis y protesta popular en el Madrid del siglo XVIII* (Madrid, 2006); Sánchez-Blanco, *El Absolutismo y las Luces*, 62-74; Stein and Stein, *Apogee of Empire*, 114.

<sup>297</sup> See Coronas González, *Historia del Derecho Español*, 392; Luque Talaván, *Universo de opiniones*, 96-101; Tomás y Valiente, *Derecho Español*, 385-389.

originally in 1348. That same year, the crown instructed Spanish universities to include the study of national law in their curriculum. This demand was repeated in 1741, as Roman law continued to dominate legal education.<sup>298</sup> José Berni y Catalá in his 1738 text, *El abogado instruido en la práctica civil de España*, urged Spanish lawyers to ignore Roman law and argue solely on the basis of the national laws.<sup>299</sup> Campomanes made the same recommendation in 1750, in an unpublished manuscript, *Reflexiones sobre la Jurisprudencia Española y Ensayo para reformar sus abusos*, which echoed the standard complaint that law students spent too much time reading Roman legal authorities, such as the Digest of Justinian, and not enough on Castilian law.<sup>300</sup> Gaspar Melchor Jovellanos, the jurist and political economist, who served as a minister in the final years of the reign of Charles III, claimed that in Spain, after the introduction of the *Partidas*:

Everything was judged according to the principles of Roman jurisprudence, and from here the opinions of the jurisconsults of Bologna began to be respected as law, introducing amongst us a body of law that was many times different, and even occasionally contrary to our national laws.<sup>301</sup>

Roman law, no matter how limited its enforceability was in theory, continued to exert a pull on jurists, at the expense, Bourbon reformers believed, of the supremacy of royal statutory law.<sup>302</sup>

Yet even those in favor of stricter observance of royal law admitted its shortcomings. The casuistry of Spanish law, its focus on the individual case rather than

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<sup>298</sup> Sánchez-Arcilla Bernal, *Manual de Historia del Derecho*, 497.

<sup>299</sup> Joseph Berni y Catalá, *El abogado instruido en la práctica civil de España* (Valladolid, 2006); Sánchez-Blanco, *El Absolutismo y las Luces*, 113.

<sup>300</sup> Llombart Rosa, *Campomanes*, 45-48.

<sup>301</sup> Gaspar Melchor de Jovellanos, "Discurso Académico en su recepción a la Real Academia de la Historia (1780)," in *Gaspar Melchor de Jovellanos: Obras en Prosa*, ed. José Caso González (Madrid, 1987), 95.

<sup>302</sup> Barrientos Grandón, *Cultura Jurídica*, 241; Merryman, *The Civil Law Tradition*, 18-20.

general patterns, worked against the formation of a rational body of law. Juan Francisco de Castro, an audiencia magistrate in Galicia and the author of the 1765 *Discursos críticos sobre las leyes y sus interpretes*, was one of the first to advocate codification as a means to eliminate the inconsistencies, contradictions and confusion in the law.<sup>303</sup> Castro and others found inspiration in natural law philosophy, which held that there was an orderly normative structure in nature that men could discern through reason.<sup>304</sup> Natural law could thus, in theory, serve as a template for the reorganization of positive legislation. It could replace Roman law as the ideal of a rational legal order. Natural law, however, was problematic in Spain. Its leading philosophers, Hugo Grotius and Samuel von Pufendorf, were Protestants who expounded a theory that did not require the intervention of God. Catholics, following Thomas Aquinas, insisted that God had implanted the rational order in the universe. Luckily for Spanish legal reformers, the early eighteenth-century German jurist Johann Gottlieb Heineccius offered a version of natural law that did not deny God's original intervention.<sup>305</sup> Gregorio Mayans and Pablo Olavide, the two leading figures in university reform under Charles III, recommended Heineccius's 1737 textbook on natural law, *Elementa juris naturae et gentium*, for use in Spanish law faculties.<sup>306</sup> Yet even without comparing it to natural law, it was easy to see the messiness of Spanish legislation.

Bourbon monarchs made concrete their regalism in new institutions. Without dismantling the Habsburg councils, which embodied the judicial dimension of

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<sup>303</sup> Juan Francisco de Castro, *Discursos criticos sobre las leyes, y sus interpretes, on que se demuestra la incertidumbre de éstos, y la necesidad de un nuevo, y metódico cuerpo de derecho, para la recta administracion de justicia* (Madrid., 1765); Sánchez-Blanco, *El Absolutismo y las Luces*, 116-117.

<sup>304</sup> Coronas González, *Historia del Derecho Español*, 393; Ian McLeod, *Legal Theory*, 4th ed. (Basingstoke, 2007), 42-60; Tau Anzoátegui, *Casuismo y sistema*, 183-193; Tomás y Valiente, *Derecho Español*, 322-4.

<sup>305</sup> Sánchez-Blanco, *El Absolutismo y las Luces*, 197-198.

<sup>306</sup> *Ibid.*, 108, 209.

governance, the Bourbons erected a parallel apparatus of secretaries of state. The secretary of state responsible for the Indies assumed responsibilities over many political matters controlled by the Council of the Indies, leaving the latter with mainly judicial duties. Serving at the pleasure of the king, rather than the life tenures enjoyed by members of the Council, the secretaries followed the royal line more obediently. The Bourbons carried out a similar institutional overlay at the local level, importing from France the intendancy system. Royal intendants acted as regional governors, concentrating in their hands power over economic, political, fiscal and even military matters. Leaving the old Habsburg institutions standing, however, ensured continual conflict between the old and new bureaucracies. The members of the Council of the Indies resented the power of the secretary of state for the Indies, and the Audiencias and viceroys did what they could to delay and sabotage the implementation of the intendancy system in America. To further disrupt the old institutions, the Bourbons, despite their theoretical objection to privileged corporations, created many new ones, such the Mining Tribunal in New Spain.

To enforce royal law more effectively in America, the crown reformed the Audiencias, in order to exert greater control over magistrates.<sup>307</sup> It ended the sale of audiencia posts in the late 1740s, as the fiscal squeeze brought on by war with Britain eased. Madrid tried to renew the rules promoting judicial impartiality, such as restricting the appointment of creoles to courts in their home districts and preventing magistrates from marrying local women.<sup>308</sup> The crown also revived the old ladder of promotion from lesser audiencias to the senior courts of Lima and Mexico and from the criminal to the

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<sup>307</sup> See Burkholder and Chandler, *From Impotence to Authority*.

<sup>308</sup> Sanciñena Asurmendi, *Audiencia en México*, 18-24. The ban on local marriages was lightly enforced, with nine of fourteen judges of the Audiencia of Mexico in 1760 married to local women.

civil division.<sup>309</sup> In 1776, the crown created the office of regent, appointed directly by Madrid to preside over the audiencias. The reform strengthened royal control by replacing as leader of the court the *oidor decano*, the most senior judge on the bench and usually a staunch defender of the court's autonomy vis-à-vis other royal institutions.<sup>310</sup>

The minister of Charles III most closely identified with these regalists reforms in Spanish America was José de Gálvez, a lawyer from Málaga appointed visitor-general of New Spain in 1765 and secretary of state for the Indies in 1776. Before he joined the government, he penned a 1759 policy paper, the *Discurso y Reflexiones de un Vasallo sobre la decadencia de Nuestras Indias Españolas*, in which he displayed his sympathies for Bourbon regalism and his support for aggressive reform in America.<sup>311</sup> In the *Discurso*, Gálvez addressed trade issues, civil government, and mining. He proposed ways the crown could end the perceived decline of its American domains, starting with the abolition of the fleet system and the Cadiz shipping monopoly. This was conventional wisdom among Spanish reformers in the mid-eighteenth century.<sup>312</sup> He also shared the regalists animus towards the power of the church, identifying as “the greatest disorder in my opinion that afflicts all of the Indies and demands the most prompt and efficient remedy is the exorbitant acquisition of real estate by the regular and secular clergy of the ecclesiastical state.”<sup>313</sup> This is a somewhat exaggerated charge for America, but served powerfully to showcase his support for regalism. He urged the crown to take immediate

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<sup>309</sup> Ibid., 46-52.

<sup>310</sup> Ibid., 114-119.

<sup>311</sup> "Discurso y reflexiones de un vasallo sobre la decadencia de Nuestras Indias." The paper is also included in Navarro Garcia, *La política americana de José de Gálvez*.

<sup>312</sup> Stein and Stein, *Silver, Trade and War*, 231-242.

<sup>313</sup> The original: “El maior desorden a mi entender que se padece en todas las Indias y que pide el mas prompto y eficaz remedio es la exorbitante adquisición de bienes raíces que a hecho el estado eclesiastico regular y secular...”



action, without consulting the papacy, since it had the inherent right he claimed to govern the church in its territory.

Gálvez also advocated legal reform. He recommended the drafting of a more rational law code for the Indies, to replace the Recopilación of 1680:

The best method would be for experienced subjects to pick out from the Recopilación de Indias the laws that should remain in observance, and fill the gaps with new laws in many matters that lack regulation, and then to put everything in good style and order to form a clear and decisive body of law, leaving the excised laws in a separate volume for erudites and historians.<sup>314</sup>

He admitted that the situation in Spain was even worse than in America, since it lacked a legal compilation on the lines of the Recopilación of 1680. Later, when Gálvez became minister of the Indies in 1776, one of his first initiatives was to assemble a committee to begin the work of a new law code for the Indies.

Most notoriously, Gálvez in his *Discurso* revealed his strong animus against creoles. The worst abuse of civil government in the Indies, he declared, was the appointment of local sons to the Audiencias of America. They were naturally greedy and favored local over the royal interest. Exaggerating his own expertise in the matter, he wrote that “the experience acquired in the handling of various matters has taught me that it would always be more appropriate to place them in Audiencias quite distant from their origins, because in the Indies the spirit of party and partiality reigns so strong.”<sup>315</sup> Indeed, Gálvez thought the crown appointed too many creoles in general to positions of

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<sup>314</sup> The original: “El mejor medio seria que por sugetos aviles se entresacasen de la Recopilacion de Indias las leyes que debieran quedar en observancia, para que lleno el vacio de las abdidias con otras nuevas en mucho asuntos que carecen de regla, y puestas todas en buen estilo y orden se formase un Cuerpo de derecho Claro y decisivo dejando las leyes reformadas en volumen separada, para que sirviesen a la erudiccion y a la Historia.”

<sup>315</sup> The original: “...me ha enseñado la experiencia adquirida en el manejo de varios negocios que siempre convendria mucho colocarlos en Audiencias bien distantes de su origen por que en Indias reyna tanto el espiritu de partido y parcialidad...”

prominence. He implied they could not be trusted. They were only interested in making money, not serving the king.

Gálvez would not have approved the decision of the *cámara* of the Council of the Indies on April 11, 1764 to appoint Francisco Xavier Gamboa to the position of *alcalde del crimen*, or criminal court judge, on the Audiencia of Mexico.<sup>316</sup> Although born in Guadalajara, Gamboa had resided in Mexico City for more than twenty years before he came to Spain in 1755. He had married there and formed tight bonds with the Basque mercantile community of the viceregal capital. If any candidate should have set off alarms about his potential bias in favor of local interests in the Audiencia district, it was Gamboa. Yet he prevailed, the first Mexican creole appointed directly to his home district – without purchasing the office – in the eighteenth century.<sup>317</sup> He had the backing of the influential Basques of the Congregation of San Ignacio. He also established his legal credentials in Madrid by writing the *Comentarios a las Ordenanzas de Minas*, recognized immediately for its quality. Campomanes, though criticizing Gamboa's proposed mining bank, opined in 1762 that "the work is truthfully very useful and the study employed in its composition immense."<sup>318</sup> Gálvez brought it with him to New Spain in 1765, after his own appointment as the first visitor-general of New Spain since the 1720s.<sup>319</sup> Without the *Comentarios* on his resume, Gamboa would likely not have won the coveted seat on the Audiencia of Mexico. Yet it spelled out a vision of law increasingly at odds with the thinking of the reformist ministers around Charles III.

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<sup>316</sup> AG Simancas, Dirección General del Tesoro, 24-184-58, "Appointment as Alcalde de Crimen," 1764.

<sup>317</sup> Burkholder and Chandler, *From Impotence to Authority*, 162-176.

<sup>318</sup> Campomanes, "Del beneficio de las minas...", 435.

<sup>319</sup> José de Gálvez, "Abril 20 de 1765, Inventario de los bienes, créditos y alhajas pertenecientes al Señor Don Joseph de Gálvez Gallardo," in *Mexico en el Siglo XVIII*, ed. Francisco Rodas de Coss (México, 1983), 51.

## Conclusion

Gamboa arrived in Madrid in 1755 as the deputy of the consulado of Mexico and left in 1764 as a magistrate on the Audiencia of Mexico, a signal achievement for a creole lawyer. His triumphant decade in Madrid spanned the final years of the reign of Ferdinand VI and the first years of Charles III. The *Comentarios* reflected optimism in the prospects of reform under the new king. Gamboa laid out a blueprint for the revitalization of New Spain's silver mines, addressing the legal, technical, and economic problems that plagued the industry. The jurist defended the Mining Ordinances of 1584, and, by extension, the larger legal order it exemplified.

When Gamboa was composing the *Comentarios*, the ground had already started to shift against *Derecho Indiano*. The Bourbon project required the apotheosis of royal law. Regalism advanced on several fronts. It pushed into the old kingdoms of Aragon, trying to create legal unity in Spain for the first time. It moved against the church, the biggest rival to the crown for both the resources and affections of the nation. It strived to turn Roman law into a concern for historians, not practicing jurists. Regalism also inspired the foundation of new institutions, more closely tied to the crown than the old Habsburg bodies. At particular risk in this Bourbon regalist program was the fiercely independent judiciary in America, which saw itself as the guardian of the constitutional order under *Derecho Indiano*. José de Gálvez championed this new form of legality in New Spain, one that clashed head-on with the conception of the legal order articulated by Gamboa in the *Comentarios*.

## Chapter Five: Security and Justice in New Spain in the 1760s

He arrives to govern peoples he does not know, to administer Law that he has not studied, to impose himself in unfamiliar customs to deal with persons whom he has never seen, and to top it off, usually comes surrounded by family equally inexperienced; he comes full of maxims from Europe unsuited to these places...<sup>320</sup>

*Representation to the crown by the city of Mexico, 1771*

### Introduction

Francisco Xavier Gamboa returned to New Spain at the end of 1764 to take up his post as *alcalde del crimen* on the Audiencia of Mexico, just as the Spanish crown was beginning to implement its long-gestating reform plan for Spanish America. The British occupation of Havana and Manila in 1762 during the Seven Years' War had spurred the government of Charles III into action. In New Spain, the crown ordered the first *visita*, or general visitation, since the 1720s in order to stamp out corrupt practices and reassert royal power. José de Gálvez, an ambitious Andalusian lawyer experienced in fiscal matters, arrived in 1765 as visitor-general.<sup>321</sup> His mandate included centralizing tax collection, stimulating silver mining, and implementing the intendancy system for local administration. Underlying these reforms was the fiscal imperative of extracting more revenue from New Spain to pay for the escalating cost of imperial defense. To assist Gálvez, the crown appointed as viceroy a deferential French general, the *marqués de*

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<sup>320</sup> "Representación vindicatoria que en el año de 1771 hizo a S. M. la ciudad de México... contra la sinrazón de un Ministro o Prelado de aquellas partes que [...] informó no ser a propósito por su espíritu sumido y abatido para empleos de alta gerarquía [...] : recopila los héroes que ha habido en aquellas regiones en ciencias y armas y lamenta el abandono con que la preocupacion de los europeos los ha despojado contra la inclinacion piadosa del Rey." "Viene a gobernar unos Pueblos que no conoce, a manejar unos Derechos que no ha estudiado, a imponerse en unas costumbres que no ha sabido a tratar con unas Gentes que nunca ha visto, y para el acierto suele venir cercado de familia igualmente inexperta; viene lleno de maximas de la Europa inadaptables en estas partes ..."

<sup>321</sup> On the *visita* see Herbert Ingram Priestley, *José de Gálvez, Visitor-General of New Spain (1765-1771)* (Philadelphia, 1916).

Croix. In their years in New Spain, from 1765 to 1771, the team of Gálvez and Croix attacked many of the traditional legal practices and procedures of New Spain. They favored a new approach to law, in which written rules trumped customary practice and the political and military representatives of the crown dominated the judicial ones. They believed New Spain required quick and decisive executive action to reshape its institutions and restore royal authority.

This chapter analyzes the Caroline legal challenge of the 1760s in the realm of criminal justice. With Gálvez occupied mainly by treasury matters during his first years in New Spain, viceroy Croix led the charge against what he perceived as an epidemic of crime and lawlessness in the cities of New Spain. To fight delinquency, he demanded from the courts more arrests, faster trials, and tougher sentences. Distrustful of the Sala de Crimen of the Audiencia of Mexico, the principal authority over criminal law in the viceroyalty, Croix moved to reduce its jurisdiction over policing and sentencing. Gamboa, the most junior and dynamic *alcalde del crimen*, or criminal court magistrate, orchestrated the defense of the Sala. He wrote several pointed submissions to Madrid accusing the viceroy of overstepping the bounds of his authority, breaking law and custom.

Two heated controversies marked the confrontation between viceroy and Audiencia. The first, erupting in October 1766, saw Croix sack the Sala de Crimen's police force in Puebla and turn the city over to the *Acordada*, a rival authority renowned for its brutal tactics in fighting crime. The second involved the sentencing of Indian convicts. Gamboa's first move as an *alcalde del crimen* in February 1765 had been to liberate Indian convicts sentenced to forced labor in the bakeries of Mexico City. Two years later, Croix ordered the Sala to send all convicts, including Indians and minor offenders, to work on the *presidios* (military fortifications) of Veracruz and Havana. In

both disputes, the viceroy undermined the jurisdiction of the Audiencia and upended long-established practices in novohispano penal law. He put New Spain's security, threatened by both foreign enemies and domestic delinquents, ahead of the crown's traditional concern for justice. One of the apparent casualties of this approach was paternalism towards the Indians, a cornerstone of Spain's imperial ethos, if not always its everyday practice. Although Croix's aggressive stance was understandable in the context of the crisis atmosphere of the 1760s, it may have weakened public trust in law and the administration of justice. Sacrificed were many of the elements that had contributed to the law's legitimacy in New Spain, such as the respect accorded to local custom and the flexibility promoted by judicial discretion.

### **Crime and Disorder in Urban New Spain**

In the 1760s, Mexico City teemed with beggars, thieves, and murderers, or at least that was the impression of viceroy Croix, who arrived in August 1766. He claimed that in his first month in office, a total of twenty-nine dead bodies turned up in city streets.<sup>322</sup> Since the seventeenth century it had become commonplace to lament the unruliness of Mexico City. It was a place of shocking contrasts, with palaces built by mining magnates cheek by jowl with shanties pieced together by Indians fleeing rural poverty. The Spanish friar Francisco de Ajofrín recorded his initial impressions of the city after arriving in 1764:

No matter that there is such grandeur in Mexico, such illustrious gentlemen, rich people, coaches and carriages, elegance and extreme wealth, it is the numerous plebe, so shabby and ragged, that make it ugly and taint everything, causing horror among those recently arrived from Europe.<sup>323</sup>

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<sup>322</sup> RAH, Bucareli correspondence, 4313, "Croix's Instructions to Bucareli," Sept. 1, 1771.

<sup>323</sup> Francisco de Ajofrín, *Diario del viaje a la Nueva España* (México, 1986), 65. The original: "Pero no obstante que hay tanta grandeza en México, caballeros tan ilustres, personas ricas, coches, carrozas, galas y

Croix was evidently one of those horrified by the city. He attributed the disorder to idleness, asserting it “one of the dominant vices of this kingdom and the cause of the popularity of gambling houses and pulquerías, where fights and brawls regularly erupt.”<sup>324</sup> In February 26, 1767 he ordered everyone without a job to “find one, in the precise and peremptory term of one month,” or be liable for service in the militia or at the presidios of Havana and Veracruz.<sup>325</sup> This decree was indicative of his general legal approach: issuing draconian orders, expected to be obeyed without question, that usually ran counter to long-established patterns of behavior.

Although reliable statistics are lacking, crime surely rose in the second half of the eighteenth century. Mexico City’s population expanded and the old patronage networks knitting together rich and poor, creoles and *castas*, began to fray.<sup>326</sup> According to the most reliable estimates, the number of inhabitants shot up from around 100,000 in the late 1740s to over 150,000 by the end of the century. It was not so much the population increase, however, that disturbed social order as its volatile fluctuations. Mexico City would swell during times of poor harvests, as Indian peasants poured in looking for sustenance from the capital’s municipal granaries.<sup>327</sup> Many then remained, eking out marginal existences as day laborers, market vendors or petty thieves. In addition, the

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extremada profusión, es el vulgo en tan crecido número, tan despilfarrado y andrajoso, que lo afea y macha todo, causando espanto a los recién llegados de Europa ...”

<sup>324</sup> AGI, Mexico, 1266, "Bando on idleness, February 26, 1767."

<sup>325</sup> Ibid.

<sup>326</sup> On patron-client relationships in colonial Mexico City see R. Douglas Cope, *The Limits of Racial Domination: Plebeian Society in Colonial Mexico City, 1660-1720* (Madison, WI, 1994).

<sup>327</sup> There are few reliable demographic sources for the eighteenth century. José Antonio Villa Señor estimated a population of 98,000 in 1742. The 1790 census ordered by the viceroy Revillagigedo calculated a population of 113,240, a severe undercounting according to José Antonio de Alzate. The scientist-priest put the population at over 200,000. Alexander von Humboldt in 1804 estimated a population of 137,000, using the conservative data of the 1790 census. See Gabriel Haslip-Viera, *Crime and Punishment in Late Colonial Mexico City, 1692-1810* (Albuquerque, 1999), 18-22.

rising cost of basic necessities like corn and cloth during the period made life ever more precarious for the poor.

Mexico City's plebeians sought solace in pulque, the fermented maguey juice imbibed by central Mexicans since time immemorial. They gathered in the city's dozens of pulquerías, viewed by the well to do as breeding grounds of vice, criminality, and civic unrest. They could not easily be shut down since they generated important tax revenues for the crown, especially after collection was taken over by treasury officials in the 1760s. In addition, most pulquerías were owned by elite families, who sold there the pulque they produced on haciendas north of the city.<sup>328</sup> The tenor of government regulation, therefore, was not to restrict sales but to minimize the disorders excessive consumption inspired.<sup>329</sup> For instance, in May 1765, the Sala de Crimen ordered pulquería owners to keep a torch lit in the front of their establishments, in order to deter the mischief often committed under cover of darkness.<sup>330</sup>

Loopholes in civil jurisdiction also exacerbated the crime problem. Both the military and the church enjoyed exemptions from the authority of the ordinary courts. The rough recruits of New Spain's militias could escape to the shelter of their barracks in the event of run-ins with the civil authorities. Other delinquents sought refuge on church property. Croix claimed the churches and convents of Mexico City were clogged with criminals, who came out at night to rob and murder. In response, he demanded the enforcement in Mexico City of a 1764 royal cédula issued for Madrid, which allowed

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<sup>328</sup> Francisco Leandro de Viana, a colleague of Gamboa in the Audiencia of Mexico, the Aránzazu confraternity, and the Basque Economic Society of Amigos del País, married into one such wealthy family, the Rodríguez de Pedroso y Arellano. Viana unsurprisingly supported the pulque interest. See Francisco Viana Pérez, "La actividad comercial de un oidor de la Audiencia de México: Francisco Leandro de Viana," in *Los Vascos en las regiones de México, siglos XVI-XX*, ed. Amaya Garritz (México, 1999).

<sup>329</sup> On pulque in Mexico City in the eighteenth century see Juan Pedro Viqueira Albán, *Propriety and Permissiveness in Bourbon Mexico*, Sonya Lipsett-Rivera and Sergio Rivera Ayala trans. (Wilmington, DE, 1999), 129-152.

<sup>330</sup> AGI, Mexico, 1701, "Cédula on pulquería illumination, May 3, 1765."



secular authorities, under certain circumstances, to arrest suspects on ecclesiastical property.<sup>331</sup> This predictably alarmed the archbishop of Mexico, Francisco Antonio de Lorenzana, normally an ally of the viceroy and visitor-general. He complained to Madrid that Croix had disregarded the opinion of the Audiencia, which had set down procedures for the enforcement of the *cédula* that required secular officials to provide evidence of offences before they could breach church immunity.<sup>332</sup> The Council of the Indies, however, backed the viceroy over the archbishop. In 1774, Lorenzana's successor, Ildefonso Nuñez de Haro, agreed to restrict church sanctuary to just two parishes on the outskirts of the city.<sup>333</sup> Nevertheless, the exemptions enjoyed by the church and military from ordinary civil authority continued to impede criminal law enforcement well into the nineteenth century.

As the main agency in charge of administering criminal justice, the Sala de Crimen of the Audiencia faced a daunting task. The court had jurisdiction over criminal cases in the first instance from Mexico City and heard appeals from decisions by local judges, *alcaldes mayores* in the country and *alcaldes ordinarios* in the towns, from throughout its district.<sup>334</sup> The court also took cognizance of the most heinous offenses committed anywhere in the viceroyalty, such as rape, murder, and treason.<sup>335</sup> The sala's authority over criminal matters in the capital even extended to the obligation of its members to make nightly rounds of the streets. The *alcaldes del crimen* were assisted by a police force. These officers, however, were hardly renowned for their professionalism or integrity. In 1756 the viceroy Revillagigedo called the audiencia's force "an apparatus

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<sup>331</sup> AGI, Mexico, 1266, "Croix to Arriaga, Aug. 31, 1767."

<sup>332</sup> AGI, Mexico, 1266, "Lorenzana to Croix, Aug. 26, 1767."

<sup>333</sup> Adriana Terán Enríquez, *Justicia y Crimen en la Nueva España Siglo XVIII* (México, 2007), 85, 111.

<sup>334</sup> On the *alcaldes ordinarios* of Mexico City see See Haslip-Viera, *Crime and Punishment*, 44-45.

<sup>335</sup> Terán Enríquez, *Justicia y Crimen*, 57.

of subordinate officers more inclined to swindle, injure and extort than to fulfill their legal duty.”<sup>336</sup>

Gamboa officially entered the Sala de Crimen on December 6, 1764, just before his forty-seventh birthday.<sup>337</sup> He joined Antonio de Rojas de Abreu and Diego Antonio Fernández de Madrid on the bench.<sup>338</sup> Croix later remarked that because of the advanced age of Rojas and the poor health of Fernández de Madrid, Gamboa was the only able-bodied member.<sup>339</sup> He therefore took on the court’s most arduous tasks, from drafting its official correspondence with Madrid to heading the nightly patrols of Mexico City. He took an active part in fighting crime and disorder. He earned a commendation from the Council of the Indies for his role in helping to quell two street brawls in January 1766 started by drunken soldiers.<sup>340</sup> He later claimed that in his years as an *alcalde del crimen* he had managed “to eradicate illegal gaming houses, gatherings where both sexes got

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<sup>336</sup> De la Torre Villar, ed., *Instrucciones y Memorias de los Virreyes Novohispanos*, 814-815.

Revillagigedo was particularly harsh in his 1755 Instructions to his successor, claiming the Sala rarely apprehended or punished criminals. The original: “...Una máquina de ministros inferiores que sirven más a las estafas, perjuicios y extorsiones, que a sus instituto; en una palabra, la contemplo de mayor daño que de utilidad al bien público, pidiendo por esto particular atención en el virrey, para contener estos excesos y declinar y cortar los muchos inconvenientes que cada día ofrece.”

<sup>337</sup> “Appointment as *Alcalde de Crimen*.”; AHN, Consejos, 20716, “*Residencia* of Cruillas, November 1766.” The Crown passed over Sebastián Calvo de la Puerta, who had been serving in the Sala as an *alcalde supernumerario*. He complained bitterly to Madrid about Gamboa’s appointment, was placated with a permanent appointment in Guatemala. AGI, Mexico, 1703, “Calvo de la Puerta to crown, March 26, 1765.”

<sup>338</sup> Rojas de Abreu, born in 1703 in Tenerife in the Canary Islands, joined the Sala de Crimen of the Audiencia of Mexico in 1739, after serving as crown attorney in Santo Domingo. He retired from the bench in 1773. Fernández de Madrid, born in Guatemala in 1726 and educated in Mexico, was appointed to the Sala in 1751, more in recognition of the merits of his deceased father, an *oidor* in Guatemala, than his own qualifications. He was promoted to the civil chamber in 1774, serving as an *oidor* until his death in 1784. Burkholder and Chandler, *Biographical Dictionary of Audiencia Members*, 116; 298-299.

<sup>339</sup> AGI, Mexico 1126, “Gálvez to Arriaga, Feb. 27, 1767.” The Crown did not fill the fourth spot until 1766 with the appointment of Francisco Leandro de Viana, formerly stationed in Manila, where he had participated in the resistance to the British occupation of 1762. See Burkholder, *Councillors of the Indies*, 135-137; Viana Pérez, “La actividad comercial de un *oidor* de la Audiencia de México: Francisco Leandro de Viana.”

<sup>340</sup> AGI, Mexico, 1701, “Gamboa to crown, May 6, 1767.” The fiscal of the Council, however, said that there was no reason Gamboa had to bring to the attention of Madrid a couple of tavern fights. At that moment, the Crown had much more serious worries about civil unrest, in the wake of the March 1766 riots in Madrid that toppled the chief minister, Esquilache.

drunk together, and many *chingüirito* stills.”<sup>341</sup> By so doing, he made enemies with many powerful figures, who he believed bad-mouthed him to top officials like the viceroy and visitor-general.<sup>342</sup>

Just before Croix assumed office, the outgoing viceroy, the marqués de Cruillas, commissioned Gamboa to pacify labor strife at Real del Monte, where mine workers rampaged in August 1766.<sup>343</sup> They were furious at the attempt by Pedro Romero Terreros, the magnate who controlled the mines along the veta vizcaína, to eliminate the *partido*, the share of the ore allotted to workers. In the turmoil that engulfed Real del Monte, rioters killed the *alcalde mayor* of the nearby town of Pachuca, who was holding some protestors in custody, and a mine foreman of Terreros. The owner himself barely escaped, fleeing to his hacienda of San Miguel. Gamboa appeared to be the ideal candidate to mediate the dispute. He was the acknowledged expert on mining law in New Spain, with the publication of the *Comentarios*, and he knew Real del Monte well from his days as a practicing lawyer. Terreros had grounds, however, to question the *alcalde del crimen*’s impartiality: Gamboa had represented the Valle Ameno party against him in the 1750s lawsuit and was already on record, in the *Comentarios*, for supporting the *partido* as a beneficial custom to motivate workers to undertake dangerous mine labor.<sup>344</sup>

Although authorized by the viceroy to use force if necessary and accompanied by a company of cavalry, Gamboa pursued a strictly pacific and judicial course. He held an inquiry, summoning workers, foremen, local officials, and neighboring mine owners to

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<sup>341</sup> AGI, Mexico, 1876, "Certificate to King, November 1769."

<sup>342</sup> AGI, Mexico, 1878, "Gamboa to Arriaga, June 13, 1770."

<sup>343</sup> On the labor strife at Real del Monte see Luis Chavez Orozco, ed., *Conflicto de trabajo con los mineros de Real del Monte, año de 1766* (Mexico, 1960); Noblet Barry Danks, "The Labor Revolt of 1766 in the Mining Community of Real del Monte," *The Americas* 44 (October 1987, 1987); Doris Ladd, *The Making of a Strike: Mexican Silver Workers' Struggles in Real del Monte 1766-1775* (Lincoln and London, 1988).

<sup>344</sup> Gamboa, *Comentarios*, 337-338.

give testimony. He consulted with his old friend Aldaco, who owned mines in the area, on the issue of the partido.<sup>345</sup> Within a month, Gamboa announced his resolution of the troubles: he proposed a new labor code for Real del Monte, which would enshrine the partido but include stiff penalties for workers' theft; he ordered the arrest of the ringleaders of the violence, but recommended an amnesty for the rest of the striking workers.<sup>346</sup> He returned to Mexico City on September 17. The marqués de Croix, who had arrived while Gamboa was away, warmly applauded the alcalde del crimen's work, "giving thanks to the said commissioned minister, for the efficiency and correct conduct, with which to my satisfaction he carried out his commission."<sup>347</sup> Gálvez as well commended Gamboa in a letter to Madrid.<sup>348</sup> Despite their praise, the viceroy and visitor-general themselves preferred a more iron-fisted approach to the problem of popular unrest.<sup>349</sup>

### **Police Corruption in Puebla**

Almost as soon as Croix arrived in Mexico City at the end of August 1766, an anonymous report landed on his desk denouncing the corruption of the Audiencia's police force in Puebla, New Spain's second largest city.<sup>350</sup> According to the informant,

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<sup>345</sup> AGN, Civil, 2166, "Aldaco to Gamboa, Sept. 6, 1766."

<sup>346</sup> Francisco Xavier Gamboa, "Ordenanzas de Don Francisco Javier de Gamboa para las minas de los distritos de Pachuca y Real del Monte, 13 de septiembre 1766," in *Vida y Obra del primer Conde de Regla* (Seville, 1975).

<sup>347</sup> Francisco Xavier Gamboa, "Consulta al excelentísimo Señor Virrey, con que dio cuenta con los autos sobre la sublevación y quietud de los minerales del Real del Monte y Pachuca..." in *Conflicto de trabajo con los mineros de Real del Monte, año de 1766*, ed. Luis Chávez Orozco (México, 1960), 244. "...dando como doy las gracias a dicho señor ministro comisionado, por la eficacia y acertada conducta, conque a satisfacción mia ha desempeñado la comisión."

<sup>348</sup> AGI, Mexico, 1876, "Representation by Gamboa to king, March 14, 1781."

<sup>349</sup> In 1767 Gálvez directed troops to suppress pro-Jesuit riots north of Mexico City and ordered the execution of dozens of alleged ringleaders. Priestley, *Gálvez*, 215-230.

<sup>350</sup> AGI, Mexico, 1265, "Memorial on police in Puebla, September 1766, included in Croix to crown, Nov. 26, 1766."

the police terrorized the city, committing crimes, abusing their authority, and protecting all sorts of illegal activity. They allegedly made it dangerous for ordinary people to walk the streets at night. The nine captains appointed by the Sala de Crimen controlled an excessive number of subalterns, who paid kickbacks to the captains in order to participate in the city's lucrative rackets. Indeed, none of the captains or subalterns received an official salary; they served theoretically on an honorary basis. The worst of the bunch was reportedly Ignacio Soto, a captain whom the sala had cleared of a murder charge in 1762 on the suspect grounds of self-defense. Soto lived in a brothel and ran his own gambling establishment, where the sons of the poblano elite reportedly fell victim to vice and dissipation.

To substantiate these serious charges, Croix asked the opinions of the bishop of Puebla, Francisco Fabián y Fuero, and of the local army commander, Francisco Fernando Palacios. Fabián was an appointee of Charles III and a regalist cleric like Lorenzana, encharged with helping to restore discipline to the novohispano church. He quickly antagonized the creole elite of Puebla, by trying to force the nuns of the city's convents to abandon their luxuries and privileges, such as private apartments and retinues of servants, for the austere common life.<sup>351</sup> He and Palacios, the military commander, corroborated the allegations against the Sala's police. They agreed that the captains profited from gambling and the manufacture and sale of prohibited alcohol, such as *tepache* (fermented fruit-based mash) and *chingüirito* (aguardiente). The bishop named two other rogue officers, Manuel Pacheco, the excommunicated owner of a pulquería who ran a gambling operation in his house, and Juan Joseph Leal, who had killed a young suspect he had grabbed unlawfully on church property.

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<sup>351</sup> Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867*, 495-496.

Both Fabián and Palacios prescribed the same medicine for Puebla: shut down the Sala's police force and turn the city over to the Acordada, the rural police force headed by Jacinto Martínez de la Concha. According to bishop Fabián, "Don Jacinto should nominate a lieutenant and a small number of subalterns, who would initiate proceedings, as they do in that city [Mexico City], and whose authority could be extended to all classes of crime if necessary."<sup>352</sup> Palacios added, "I believe that if Your Excellency rids this city of all the commissioners of the Sala de Crimen and their dependents you would do a great service to God and the King, to this community, and even to the Royal Audiencia itself, whose reputation suffers for its tolerance of such men."<sup>353</sup> They proposed Puebla follow the lead of Mexico City, where important citizens had invited the Acordada in the late 1740s to police their streets.<sup>354</sup>

For the Audiencia of Mexico, the main difficulty in defending its police in Puebla was that its own founding statute of 1528 gave it no legal authority to appoint such a force. The Sala de Crimen's direct jurisdiction over criminal matters was restricted to a five-league radius of Mexico City. In a letter to Croix, Gamboa and his colleagues argued, nevertheless, that they now exercised such a right based on "practice, custom and use, rooted by the force of the superior authority of the Tribunal, supported by the Laws, for the exercise and handling of the entire universe of criminal actions."<sup>355</sup> As the highest judicial authority in New Spain, the Audiencia often assumed powers not strictly allotted to it, in order to fill in gaps in the administration of justice. For instance, the civil division heard mining lawsuits, despite express words in the Mining Ordinances of 1584 prohibiting its cognizance. Where institutions of the crown were lacking, it was natural

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<sup>352</sup> AGI, Mexico, 1265, "Fabián y Fuero to Croix, Oct. 4, 1766."

<sup>353</sup> AGI, Mexico, 1265, "Palacios to Croix, Sept. 27, 1766."

<sup>354</sup> Terán Enríquez, *Justicia y Crimen*, 108.

<sup>355</sup> AGI, Mexico, 1265, "Sala de Crimen to Croix, Oct. 14, 1766." In light of references to 1763 and 1764, before Gamboa had joined the court, the likely author of the letter was Fernández de Madrid.

for the Audiencia to expand its jurisdiction in the interests of justice. In its October 1766 letter to the viceroy, the *alcaldes del crimen* pointed to numerous times since the early seventeenth century when the crown had backed the Sala's direct involvement in policing outside of the capital, such as its appointment of *alcaldes provinciales* to police rural areas. According to Gamboa and the others, "its Ministers would not be able to manage or carry out the obligations particular to its mission without the existence of the captains and commissioners, who investigate, report and facilitate what is necessary, and who risk their lives in order to protect those of any superior Minister, *corregidor* or *alcalde* whom they accompany."<sup>356</sup> Since the Sala's right to control police outside of Mexico City seemed secure in custom and local need, Gamboa and his colleagues argued that the proper solution to the problem was to allow the court to discipline its own officers, if credible evidence of wrongdoing could be proffered.

What should prevail, the original text of the audiencia's 1528 constitution or the subsequent practice enshrined in law? Diego de Cornide, Croix's official legal advisor, a jurist from Galicia with no previous experience in America, had no doubt.<sup>357</sup> He told the viceroy that the Audiencia clearly had no authority by the plain wording of the 1528 law. All such appointments were thus null and void. He compared the situation in New Spain to that of Spain, where the chancelleries of Valladolid and Granada, the highest courts in Castile, had no power to name police captains outside of their home cities. Only in emergencies beyond the capacity of local authorities, such as Indian uprisings, might the

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<sup>356</sup> AGI, Mexico, 1265, "Sala de crimen to Croix," Oct. 14, 1766. It is not clear whether Gamboa wrote this letter. Perhaps the references to events in 1763 and 1764, before he had joined the court, suggest either Rojas y Abreu or Fernández de Madrid was the author.

<sup>357</sup> Cornide was particularly despised by the opponents of Gálvez and Croix. An anonymous verse of the time attacking Croix and his entourage put it this way: "Llevate, a tu Cornide / ese, toso Gallego, / que robaba, a dos manos, / mientras, que tu, jugabas a los cientos." My translation: "Get rid of your Cornide, that coarse Galician, who robbed with both hands, while you were playing card games." BN (Madrid), MS-20258-31, "Varias composiciones en verso contra Gálvez y el Marqués de Croix, de hacia 1771."

Sala, with the approval of the viceroy, commission external agents. Yet with the establishment in 1722 of the Acordada, Cornide could not foresee any reason why the viceroy would ever again entrust the Sala with such powers.<sup>358</sup> Cornide's opinion encapsulated the legal approach of the Caroline reformers. The king's statutory law was paramount and American practices should be forced to conform to Spanish models. Local autonomy and custom were no longer considered elements to keep the legal order supple and legitimate, but vices that detracted from royal authority.

In November 1766, with Cornide's legal opinion in hand, Croix unilaterally dismissed the Sala's police force in Puebla and ordered the arrest of Soto. He invited the Acordada to assume policing functions in Puebla and extended its jurisdiction over crime to the whole viceroyalty.<sup>359</sup> With this move, undertaken without consultations with the affected parties, the Acordada displaced the Sala de Crimen of the Audiencia as the principal organ of criminal law enforcement in New Spain.

Less than fifty years earlier, the forerunner of the Acordada had been subordinate to the Audiencia.<sup>360</sup> It was part of the Santa Hermandad, the informal police of the Spanish world that patrolled roads. In 1719, with an upsurge in highway crime in central New Spain, which threatened the silver routes, the viceroy, the duque de Arión, and the Audiencia of Mexico agreed to grant extraordinary powers to the Hermandad of Querétaro. Led by Miguel Velázquez, this force was allowed to deal with brigands as it saw fit, without having to answer to the Audiencia. This agreement between viceroy and

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<sup>358</sup> AGI, Mexico, 1265, "Cornide to Croix, Nov. 22, 1766."

<sup>359</sup> Terán Enríquez, *Justicia y Crimen*, 110.

<sup>360</sup> On the Acordada see Colin M. MacLachlan, *Criminal Justice in Eighteenth Century Mexico: A Study of the Tribunal of the Acordada* (Berkeley, 1974); Jesús D'abbadie Soto Enrique Mendoza Muñoz, *El capitán Miguel Velázquez Lorea y el Real Tribunal de la Acordada de la Nueva España: antología documental*, 1. ed. (Querétaro, México, 2006).



Audiencia - the *Acordada* - was ratified by the crown in 1722.<sup>361</sup> Much to its later chagrin, the Audiencia had in fact consented to the derogation of its own power.

Velázquez and his son and successor, José Velázquez, succeeded in making the roads of New Spain more secure. They achieved this by adopting harsh methods. They executed culprits on the spot and displayed their severed heads or broken bodies in public as a deterrent. They ignored the punctilious procedures followed by the Sala de Crimen in its conduct of criminal trials. Their success assured the permanence of their extraordinary powers. The *Acordada* evolved from a loose rural police force minding the roads to a powerful and feared institution with operations in New Spain's major cities. Exempt from the authority of the Audiencia, it reported only to the viceroy. The first Revillagigedo, who approved the *Acordada*'s entry to Mexico City, praised the performance of its chief José Velázquez:

who with inflexible justice, tenacity, and integrity managed to exterminate execrable crimes, condemned to death or presidios innumerable criminals, for which his commission has earned all the protection of my predecessors, since the marqués de Valero, including me, with the satisfaction that the whole kingdom feels.<sup>362</sup>

The *Acordada* set up a system of criminal justice parallel to that of the Sala de Crimen in Mexico City, with its own patrolmen, tribunal, and jail. The line of jurisdiction between the Audiencia and the *Acordada* was never defined, although in practice the older institution tended to focus on crimes against the person, such as rape and murder, while the *Acordada* dealt mainly with property crimes.<sup>363</sup> In 1772, the *Acordada* also assumed responsibility for the separate field of prohibited drinks in New Spain.

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<sup>361</sup> Terán Enríquez, *Justicia y Crimen*, 74-75.

<sup>362</sup> De la Torre Villar, ed., *Instrucciones y Memorias de los Virreyes Novohispanos*, 799. Ironically, the first viceroy to turn against the *Acordada* was Revillagigedo's son, the second count of Revillagigedo, viceroy from 1788 to 1794. He tried unsuccessfully to abolish it, concerned with the abuses of its expansive jurisdiction.

<sup>363</sup> Michael C. Scardaville, "(Hapsburg) Law and (Bourbon) Order: State Authority, Popular Unrest, and the Criminal Justice System in Bourbon Mexico City," *The Americas* 50 (April 1994, 1994): 510.

The crucial difference between the competing tribunals was procedure in the conduct of criminal cases. The sala adhered to the rules first laid down in the Partidas and elaborated by Juan de Hevia Bolaños in his widely-used legal text, *Curia Philippica*, published in Lima in 1603.<sup>364</sup> A complainant (or the court itself acting *ex officio*) began with a formal accusation, called the *sumaria*. From this, the court could order the arrest of the accused and the seizure of his property. It might then render a summary judgment, if there were no grounds to doubt the culpability of the accused. If the accused proclaimed his innocence, complainant and defendant would then substantiate their cases by gathering sworn witness statements. This *substanciación* phase consumed the most time and led to the most criticism. Prisoners could languish in custody for months or even years while evidence was collected. The parties would then prepare briefs summarizing their arguments and evidence. They would often have the benefit of a court-appointed lawyer or *procurador* to shepherd them through the process. Finally, on the basis of the written record, the court would render its decision, or *sentencia*, and order punishment if required.<sup>365</sup> Following these procedures was a badge of honor for the Audiencia. When Croix criticized the pace of its deliberations, the *alcaldes del crimen* responded that “the slowness in the process has been in the necessary and indispensable steps in the substantiation of the offence and the defense of the accused.”<sup>366</sup> The Acordada was more efficient than the Sala because it handled most of its cases by summary proceedings.<sup>367</sup>

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<sup>364</sup> The *Curia Philippica* was the most published juridical text in the Spanish world from the seventeenth to the nineteenth centuries. See Santos M. Coronas González, “Hevia Bolaños y la Curia Philippica,” *Anuario de Historia del Derecho Español* LXXVII (2007). Gamboa cited it frequently in his *Comentarios*, 21, 126, 31, 33, 39, 346, 375, 452.

<sup>365</sup> On criminal procedure in colonial Spanish America see Herzog, *Upholding Justice*, 24-42; Owensby, *Empire of Law*, 170-171; Terán Enríquez, *Justicia y Crimen*, 86-90.

<sup>366</sup> AGI, Mexico, 1265, “Sala de Crimen to Croix, Sept. 16, 1766.”

<sup>367</sup> Martínez de la Concha imposed certain formalities on the conduct of the Acordada’s officers once they began to patrol city streets, culminating in a set of regulations in 1776 adopted under Martínez’s successor, Francisco Antonio de Aristimuño. Terán Enríquez, *Justicia y Crimen*, 78, 92-94. On Audiencia complaints of the acordada’s lack of due process, see Sanciñena Asurmendi, *Audiencia en México*, 211-213.

Croix's decision to sack the Audiencia's police force in Puebla and replace it with the Acordada outraged Gamboa and his fellow *alcaldes del crimen*. On behalf of the Sala, Gamboa immediately wrote two blistering letters deploring the viceroy's action.<sup>368</sup> The first, to the Council of the Indies, addressed the allegations against the police in Puebla. Gamboa claimed Croix gravely violated the Sala's jurisdiction by taking unilateral action, without consulting with the court beforehand:

The Sala does not know the causes of such a scandalous measure, offensive to its dignity and authority, or the reports, public, secret, officious, impartial or self-interested, that might have been made to the Viceroy; and it would have been very appropriate if the Sala had been notified, so that it could have examine [the police] and punished those who turned out to be guilty, as it has always done with the utmost zeal, dismissing, banishing, and putting into the *Presidios* those who failed in their obligation.<sup>369</sup>

Gamboa did not dispute that some members of its force in Puebla might have acted wrongly, although he specifically defended the captains Juan Joseph Leal and Ignacio Soto. Soto, he claimed, "perpetrated for the necessary defense of his life and that of his son the homicide of Juan Domínguez, who insulted them cowardly and violently with weapons, as the court record attests." Gamboa requested in the Sala's name an order from Madrid reversing Croix's decision and compelling the viceroy to provide the Sala with the particulars on the alleged police misconduct.

In the second letter, Gamboa warned Croix of the danger of the Acordada. He predicted that if the rival tribunal gained unlimited jurisdiction over all criminal matters in New Spain, as the viceroy had decreed, the administration of justice would be imperiled.<sup>370</sup> With independence from the oversight of the Audiencia, the commissioned

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<sup>368</sup> Although all the *alcaldes del crimen* signed them, the slashing tone, reminiscent of other known letters by Gamboa, and the references to events "before our time" in the early 1760s suggest strongly that it was Gamboa who composed these letters.

<sup>369</sup> AGI, Mexico, 1265, "Sala de Crimen to Council of the Indies, Nov. 24, 1766 (Puebla police)."

<sup>370</sup> AGI, Mexico, 1265, "Sala de crimen to Croix," Nov. 24, 1766; AGI, Mexico, 1265, "Sala de Crimen to Croix, Nov. 24, 1766."

officers of the Acordada, “scattered throughout this vast kingdom, would live without restraint, harassing and destroying the vassals of His Majesty without recognizing another superior in the midst of these distances than the Judge of the Acordada, with scorn for the Audiencias, Governors, and Judges, against the Laws, practice and style always observed and the determinations of this government.” At least the Sala’s own police could be called to account for misconduct. Gamboa’s accusations echoed what Audiencia ministers had been saying for decades: the autonomy of the Acordada ultimately imperiled the administration of justice and the welfare of the king’s subjects.<sup>371</sup>

Gamboa accused viceroy Croix of both ignorance and dereliction of duty. He vowed to continue to oppose “the Resolutions that we see being taken by him alone, without consultations, against the Laws, without the effects corresponding to his desires, but rather with unavoidable and manifest harm to the vassals” of New Spain.<sup>372</sup> The viceroy might be zealous in his service to the Crown but he did not understand New Spain. These were sharp words to use against a viceroy. They signaled how early and irrevocably the relationship between Croix and the criminal division of the Audiencia of Mexico broke down in the first year of the viceroy’s tenure.

How did the crown respond to this row between its representatives in New Spain? The crown attorney of the Council of the Indies, Manuel Miguel Lanz de Casafonda, backed the Sala de Crimen.<sup>373</sup> He wrote that on the basis of the evidence available to Croix, the viceroy should have allowed the Sala to discipline its own subordinates. The

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<sup>371</sup> Gamboa had a personal reason to scorn the Acordada. Its notorious violence had followed him home one night. In June 1765, two Mexico City captains, Nicolás Francisco Rivero and Juan Nepomuceno del Castillo, were arrested for an armed altercation on the doorstep of Gamboa’s house. AHN, Consejos, 20716, “*Residencia of Cruillas*,” November 1766. MacLachlan, *Criminal Justice*, 89.

<sup>372</sup> “Sala de Crimen to Council of the Indies, Nov. 24, 1766 (Puebla police).”

<sup>373</sup> Burkholder, *Councillors of the Indies*, 67. Lanz de Casafonda was an erudite lawyer, with command of Greek and Hebrew, who served on the Council of the Indies without having any direct American experience.

fiscal was also persuaded that the practice of the Audiencia commissioning police captains outside of Mexico City was justified by the circumstances of New Spain. He recommended that the Sala and viceroy should work together to reduce the admittedly excessive number of captains and subalterns. Croix should also leave “free and clear the Jurisdiction and powers that that Real Sala has conceded by the laws, without putting before them any impediment.”<sup>374</sup> The Council of the Indies, however, rejected its fiscal’s opinion. Its judgment tersely stated the Sala should desist from appointing captains outside of a five league radius around Mexico City.<sup>375</sup> It was hard to argue around the unequivocal language of the original 1528 text in light of the evident mischief caused by the Sala’s police in Puebla.

Madrid may soon have regretted its support of Croix in this matter. The viceroy became increasingly brazen in his disrespect not only for the authority of the Audiencia but the Council of the Indies itself. On three occasions, from 1766 to 1770, he intercepted Council appointees for the Manila Audiencia, who were passing through New Spain, and placed them as crown attorneys in the Sala de Crimen to substitute for sick or absent judges. As the titular president of the Audiencia, the viceroy claimed the right to make such ad hoc appointments. The Council of the Indies, however, agreed with the Audiencia of Mexico that in such cases the law was absolutely clear: either the most junior oidor in the civil division should step in or, if none was available, a respected local lawyer.<sup>376</sup> The most famous of Croix’s irregular appointees was José Antonio de Areche, the future visitor-general of Peru.<sup>377</sup> Protected by distance and the supreme authority of

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<sup>374</sup> AGI, Mexico, 1265, "Opinion of fiscal, Oct. 8, 1767."

<sup>375</sup> AGI, Mexico, 1265, "Opinion of Council of the Indies, Oct. 29, 1767."

<sup>376</sup> AGI, Mexico, 1703, "Opinion of the Council of the Indies, June 16, 1767."

<sup>377</sup> On Areche’s disastrous performance as visitor-general, which triggered the Andean rebellions of the early 1780s, see Serulnikov, *Subverting Colonial Authority: Challenges to Spanish Rule in Eighteenth-Century Southern Andes*; Ward Stavig, *The World of Tupac Amaru: Conflict, Community and Identity in Colonial Peru* (Lincoln, 1999); Charles F. Walker, *Smoldering Ashes: Cuzco and the Creation of*

Gálvez in New Spain, Croix's appointment of Areche in December 1766 was allowed to stand. The new crown attorney became a trusted ally of Croix and Gálvez throughout the visita.<sup>378</sup>

In routine matters as well, viceroy Croix did not hide his disdain for the magistrates of the Audiencia. They complained to Madrid in 1768 that he neglected to greet them personally on feast days, convened meetings of the acuerdo in his personal residence instead of its designated chamber, and failed to request their presence when opening important papers from Madrid.<sup>379</sup> Repeatedly, the Council of the Indies had to remind the viceroy to obey the law and respect the dignity and authority of the Audiencia. In the years of the visita, however, the top ministers of Charles III and the Council of Castile assumed the upper hand in American affairs. The dynamic crown attorneys of Castile, Pedro Rodríguez Campomanes and José Moñino, defended Gálvez and Croix from the grumblings of the councillors of the Indies.<sup>380</sup> The crown's priority was reestablishing royal authority in New Spain, and many of the old rules of American government were considered obstacles to this end.

### **Panaderías y Presidios**

As the issue of the Sala's police in Puebla inflamed relations between the Audiencia and the viceroy, another controversial matter arose, this one concerning the punishment of criminal convicts. Gamboa was again at the center, defending the Audiencia's traditional prerogatives in the sentencing of prisoners and protesting Croix's demand that all convicts be sent to work on military installations. The controversy had an

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*Republican Peru, 1780-1840* (Durham, NC, 1999). The other two Manila-bound officials recruited by Croix were Domingo Blas de Basarez in 1767 and Juan Gomez Bonilla in 1770.

<sup>378</sup> Burkholder, *Councillors of the Indies*, 12-13.

<sup>379</sup> AGI, Mexico, 1127, "Opinion of Council of the Indies," May 14, 1768.

<sup>380</sup> Priestley, *Gálvez*, 177, 183, 201-205.

ironic twist: Gamboa, whose first major action as an *alcalde del crimen* was to liberate Indians held in privately-owned bake shops in Mexico City on humanitarian grounds, ended up defending the *collera*, the practice of selling prisoners to work sites. Croix, who attacked the *collera* as inhumane, proposed the even harsher punishment of work on *presidios* as a replacement. At stake in this controversy was not just the question of humane treatment of convicts but the financial health of the Sala del Crimen and other criminal law agencies in the viceroyalty. They depended on the income generated from the sale of prisoners to private work places.

In February 1765, Gamboa ordered the release of approximately one thousand Indians confined to Mexico City's seventy *panaderías*. These were all minor offenders, whose crimes did not warrant either physical punishment or long-term confinement. In May 1765, after the bakers had complained of the loss of their workers to the viceroy Cruillas, Gamboa responded that:

there is not in all of the *Recopilación de las Indias*, laws and ordinances more emphatically recommended than those that look to the liberty and good treatment of the Indians, excusing them from personal service, and of being abused for protracted periods, defrauded of their just labor, and tormented by confinement, deprivations, and whippings...<sup>381</sup>

Gamboa accused the bakers of violating the well-established proscription against Indian slavery. They had abused their workers both physically and economically. The *panaderos* allegedly flogged Indians for disobedience and charged them extra for basic necessities, like clothes, food and religious services. They deliberately ran up workers' debts, forcing them to serve longer than the sentences imposed by the courts. To defend fundamental

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<sup>381</sup> AGI, Mexico, 1130, "Representation," May 31, 1765. The original: "No ay en toda la Recopilacion de las Indias Leyes y Ordenanzas mas enixamente recomendadas que las que miran a la libertad y buen tratamiento de los Indios, a escusarlos de el Servicio personal, y de ser violentados por dilatado tiempo, defraudados de su justo trabaxo, bexados con encierros, privisiones, y azotes, y de que se destruia el numero de su Nacion con lo recio de el trabajo, clamando todas las de el libro 6 que despues de el Gobierno espiritual, sea este el primero, y principal cuidado de los Virreyes, Presidentes, Audiencias, Governadores, y demas Justicias..."

justice, Gamboa averred that the Audiencia's Sala de Crimen had no choice but to liberate the Indians and cancel their debts.

Why was Gamboa so insistent on protecting Indians? He took an oath upon becoming an *alcalde del crimen* that enjoined him not "to cause them any harm or vexation, since it is necessary to attend to their comfort and conservation."<sup>382</sup> By protecting the Indians, however, he also put the bakers in their place. The *panaderos* had petitioned the viceroy for a new set of regulations, which would exempt them from both the oversight of the Audiencia in labor matters and the obligation to cover the Indian tribute payments. They sought control over the bread market, to prevent independent vendors of wheat or flour from setting up market stalls. In Gamboa's May 1765 report to Cruillas, he wrote:

It is worthy of all of the attention of Your Excellency in order to make demonstrable that this legal spokesman [of the bakers] and his contribution only serve to create a strong body that could resist the rulings of the Justices, even ones so impeccable and respectable as those that flow from the Laws and ordinances in favor of the liberty and good treatment of the unhappy Indians; when their effort would be better employed either in increasing the size of the loaf in favor of the public or in the just payment for the strenuous and harsh work of the unfortunate worker.<sup>383</sup>

Ever vigilant against threats to the jurisdiction of the Audiencia, Gamboa launched a pre-emptive strike against the bakers by freeing their Indian laborers on the grounds of mistreatment.<sup>384</sup>

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<sup>382</sup> "Appointment as *Alcalde de Crimen*."

<sup>383</sup> AGI, Mexico, 1130, "Representation by Gamboa to Cruillas, May 31, 1765."

<sup>384</sup> Gálvez later championed the bakers' guild, in one of his last and most controversial initiatives as visitor-general. He gave them the monopoly over the sale of bread in public markets and allowed them to reduce the size of the official loaf. The protest from all sectors of society, from wheat farmers to the archbishop Lorenzana, prompted Madrid to quickly rescind the new regulations. See BRP, Mis. de Ayala, II/2869, "Reglamento del Gremio de Panaderos de Mexico, Nov. 12, 1770." AGI, Mexico, 1129, "Opinion of the Council of the Indies, March 2, 1773." An anonymous verse at the time indicates the public anger towards Gálvez: "Este es, aquel, Persiano Famorlán, que despues de tener sujeto el Reyno con tanto arbitrio, descendió su afan a la ultima maldad, que le previnó su espiritu fatal, quitando el Pan las onzas,



After declaring the Indian convicts free on account of the systematic abuse meted out by the bakers, why did Gamboa not then call for the abolition of the system of selling prisoners to private employers? This system, called the *collera* after the yoke that bound prisoners together as they marched, had existed since the late sixteenth century. Gamboa claimed as a judge he had no legal authority to quash it. As he wrote to Cruillas, "Although the viceregal power includes issuing ordinances, once in place, it corresponds to all the tribunals to administer justice according to them ... for as St. Augustine says, it is not licit for the judge to judge the law, but to follow it."<sup>385</sup> Behind this legal position, however, was a compelling material interest. The uncomfortable truth was that the Sala depended on the income generated from the sale of convicts. In the eighteenth century, owners of *obrajes* (textile factories) paid the court one hundred and eighty pesos in annual installments for prisoners serving six-year terms. Bakers and pork butchers paid fifty pesos for lesser offenders, sometimes able to choose their workers according to their skill sets.<sup>386</sup> These funds covered the salaries of the court's auxiliary staff, including the porters, chaplain, medical doctor, jail warden, notaries, and attorneys for the poor, all necessary for the day-to-day operations of the court.<sup>387</sup> The dependence was such that the sala often compelled employers to buy workers, even if they were not needed.<sup>388</sup> The Acordada and the municipal courts also sold prisoners to private employers.<sup>389</sup> To terminate the *collera*, therefore, would handicap the entire administration of justice.<sup>390</sup>

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que arbitrio, todo vecino, haciendo, que llorase, daño tanto todo este Imperial Leal, en tal Quebranto."

"Varias composiciones en verso contra Gálvez y el Marqués de Croix, de hacia 1771."

<sup>385</sup> "Representation by Gamboa to Cruillas, May 31, 1765."

<sup>386</sup> Haslip-Viera, *Crime and Punishment*, 106.

<sup>387</sup> In her study of the penal system in colonial Quito, Tamar Herzog highlights the importance of the auxiliary staff of the Audiencia of Quito. Herzog, *Upholding Justice*, 47-53.

<sup>388</sup> Haslip-Viera, *Crime and Punishment*, 107-109.

<sup>389</sup> *Ibid.*, 102-106.

<sup>390</sup> AGI, Mexico, 1126, "Opinion of Council of the Indies," May 29, 1767.

The unlikely champion for the abolition of the collera was Croix. His motive, however, was hardly altruistic. In his first communications with the Sala in September 1766, Croix urged the court to clear up its backlog, crack down on murder, and send more convicts to work on the military fortifications of Veracruz and Havana.<sup>391</sup> He was under pressure from Madrid to speed up work on Spain's defenses in northern Spanish America. Forced labor on presidios had long been a punishment for serious offenders. Indeed, under Cruillas, the court had already begun to send more convicts to work there. When the Sala balked at Croix's original request to send more prisoners to the presidios, arguing that the punishment was disproportionate to most offences, Croix issued a viceregal decree on May 26, 1767 making presidio labor mandatory for all convicts, including Indians, minor offenders, and vagrants. The sale of convicts to closed work places, from panaderías to obrajes, was officially outlawed.<sup>392</sup> To save money, the viceroy proposed that the prisoners proceed across the mountains to the Gulf coast on foot.<sup>393</sup> Although he claimed to be acting for humanitarian reasons in shutting down the collera, it was difficult to see how forced labor on distant fortifications, after marching across the country, represented more humane treatment.

Croix's order predictably enraged the *alcaldes del crimen*. Gamboa, writing on behalf of the court, protested immediately to Madrid.<sup>394</sup> He first emphasized the impact the viceroy's measure would have on New Spain's Indian population:

Banishing an Indian to a presidio would, it's true, punish his offence, but it would also gradually consume his species and impede his reproduction, very important matters since without the Indians, there would be no Indies, no Agriculture, no

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<sup>391</sup> AGI, Mexico, 1265, "Croix to Sala de Crimen, Sept. 10 & 15, 1766."

<sup>392</sup> AGI, Mexico, 1130, "Decision by Council of the Indies, May 21, 1777."

<sup>393</sup> AHN, Consejos, 20719, "*Residencia* of Croix," March 24, 1774. The Crown praised him for this cost-saving initiative.

<sup>394</sup> Although the representations by the Sala on this matter were signed by all the *alcaldes del crimen*, the similarity of their language with Gamboa's 1765 statement on the release of the bakery workers leaves no doubt he was the author.

Mines, no Irrigation, no work of any sort. In their exile they would be removed from their natural climate, with damage to their health, and would stop paying tribute. Their families, children and homes would be left forever abandoned and unprotected. This has always been the problem with banishment and thus it is of pure necessity that they are distributed to these work places, where they can live peacefully, pay their tribute to Your Majesty, and receive just punishment for their crimes.<sup>395</sup>

Gamboa powerfully juxtaposed Croix's sentencing policy to the crown's traditional paternalism towards America's native population. Since the time of Bartolomé de las Casas, the Spanish crown had considered the protection of the vulnerable Indians as one of its primary duties in America.<sup>396</sup> Spaniards not only had to care for Indian souls, by assuring they embraced Christianity, but for Indian bodies as well. As Solórzano said in the mid-seventeenth century, Indians were "the feet of the republic," indispensable to the functioning of the colonial economy.<sup>397</sup> Gamboa acknowledged as well that Croix's decision would result in "the extinction of the funds that the Sala had used for the administration of Justice and the processing of cases."<sup>398</sup> In essence, Gamboa argued the viceroy had upset the delicate balance between the obligation to protect Indians and the financial needs of the courts.

As long as Croix and Gálvez remained in New Spain, the sentencing issue could not be resolved. The Sala wrote to Madrid at least four times between 1767 and 1771, complaining about their loss of income from the collera and the subsequent harm to the administration of justice. Finally, in 1774 Tomás Ortiz de Landázuri, the accountant-

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<sup>395</sup> AGI, Mexico 1130, "Representation to crown, June 26, 1767." The original: "Desterrando a Presidio el Indio, verdad es, que quedaría castigado su delicto, pero se iría consumiendo su especie, se impediría su multiplico, tan importante, como que sin Indios, no havría Indias, ni Agricultura, ni Minas, ni Reguas, ni labores, ni otro algun ministerio de trabajo. En su destierro mudarían de temple, con ofensa de su salud, dexarian de pagar el tributo, y a sus familias, hijos y chozas en un eterno abandono y desamparo: y assí ha sido siempre, y es de pura necesidad repartirlos, en estas oficinas para que vivan, manidablemente, paguen su tributo a VM y la justa pena de su delicto."

<sup>396</sup> Cañeque, *The King's Living Image*, 187-193; Owensby, *Empire of Law*, 55-56.

<sup>397</sup> Owensby, *Empire of Law*, 299; Solórzano Pereyra, *Política Indiana*, 1:580-81.

<sup>398</sup> AGI, Mexico, 1707, "Notes on collera controversy," Dec. 23, 1767.

general of the Council of the Indies and friend of Gamboa, asked Croix's successor, Antonio María de Bucareli, to examine the issue afresh.<sup>399</sup> Bucareli quickly came up with a solution. He proposed the continuation of the prohibition on the sale of convicts to the obrajes, the most notorious sites of prisoner abuse, but the resumption of sales to city bakeries and butcher shops. Labor at the presidios would be reserved for only the most serious offenders. To make up for the lost income from obraje sales, the viceroy suggested that twelve thousand pesos of the crown's income from the pulque tax be earmarked annually to the Sala and Acordada to pay the wages of support personnel. It was a judicious compromise, recognizing that pulque was a prime factor in what entangled people in the criminal justice system in the first place.<sup>400</sup> Nonetheless, it did in a way further the erosion of the Audiencia's autonomy as it replaced an independent source of income, the collera, with a one controlled by the emerging state.

### **The first exile of Gamboa**

The expulsion of the Jesuits from New Spain in June 1767 exacerbated the crisis atmosphere in the viceroyalty and cast a shadow over many creole officials, Gamboa among them. The Society had been implicated by Campomanes in the anti-government riots in Madrid of March 1766. In reality, the Jesuits' offence was to stand athwart the regalist project of Charles III. They were too rich and independent for the liking of the king and his ministers. The combination of Gamboa's known sympathies for the order

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<sup>399</sup> It was not the first time that Bucareli had to fix something left broken by Croix, the most important being his quick remedy of the mining stalemate at Real del Monte in 1771. I address this incident in chapter seven.

<sup>400</sup> "Decision by Council of the Indies, May 21, 1777." Bucareli's solution was not officially endorsed by the Council of the Indies until 1777.

and his opposition to the measures of Croix and Gálvez marked him as a political threat.<sup>401</sup>

Just after the expulsion, Croix reported Gamboa to Madrid for speaking out spitefully against the government. The crown issued a reprimand, which was delivered to Gamboa in public on February 5, 1768. The *alcalde del crimen*, mortified by the chastisement, immediately wrote to defend himself to Julián Arriaga, the secretary of state of the Indies, whom he knew from his Madrid days.<sup>402</sup> He denied harboring ill will towards the government and reminded the minister of his services to the crown, such as cracking down on crime in Mexico City and mediating the labor unrest at Real del Monte. Gamboa knew that the reason he had gained the viceroy's disfavor was the submissions he had made against Croix's criminal law policies, which he wrote had been necessary "in fulfillment of the responsibility entrusted to me by the king."<sup>403</sup> Far from apologizing, Gamboa repeated the charge that the viceroy had violated the law and his duty to the king's vassals. Speaking specifically of Croix's abolition of the *collera* he reiterated his belief that sending Indians to labor on the *presidios* instead of nearby bakeries or cloth factories would break up families, deprive the haciendas and mines of New Spain of workers, and shrink the income received from Indian tribute payments.

Beyond the biting representations against the viceroy, Gamboa also kept suspect company with known opponents of the *visita*. He had become the "inseparable companion," in the words of Croix, of Juan Antonio de Velarde, the crown attorney of the civil division of the Audiencia. Velarde, a peninsular Spaniard, had served in America since 1739, arriving in New Spain in 1760. He was the legal advisor to Croix's

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<sup>401</sup> On the Madrid riots, sometimes referred to as the cloak and hat riots for the populace's objection to the government's sumptuary laws, see López García, *El Motín contra Esquilache: Crisis y protesta popular en el Madrid del siglo XVIII*.

<sup>402</sup> AGI, Mexico, 2778, "Gamboa to Arriaga, Feb. 26, 1768."

<sup>403</sup> AGI, Mexico, 2778, "Gamboa to Arriaga," Feb. 26, 1768; "Gamboa to Arriaga, Feb. 26, 1768."

predecessor, Cruillas, when Gálvez began the visita.<sup>404</sup> On behalf of Cruillas, he had tried to limit the scope of Gálvez's inquiry, arguing that the visitor-general had no authority to investigate the viceroy in treasury matters.<sup>405</sup> Even after Croix replaced Cruillas, Velarde continued to oppose the visita.<sup>406</sup> According to Croix, he said to Gálvez's face that the visita would fail, as it was "founded on futile principles, and had against it the repeated experiences of those who had tried the same in other times, with better preparations."<sup>407</sup> Croix also reported to Arriaga that Velarde and his friend Gamboa "openly welcomed all those hostile to the measures of the Visita" and had hatched a plot in Gamboa's home to discredit Gálvez.<sup>408</sup> Gamboa did his part by accusing Gálvez and his subordinates of illegal gambling, "with such vivid descriptions that I assure Your Excellency that he almost persuaded me that it was true."<sup>409</sup> Even if an organized plot was unlikely, there was little doubt that Gamboa opposed Gálvez, a fact sufficient in the circumstances to warrant a reprimand and possibly a more severe penalty.<sup>410</sup>

Gamboa was also the friend of the priest accused of writing a pro-Jesuit pamphlet, Antonio Lorenzo López Portillo, a canon of the cathedral chapter, a former rector of the University of Mexico, and, like Gamboa, a Jesuit-educated native of Guadalajara.<sup>411</sup>

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<sup>404</sup> AGI, Mexico, 1369, "Croix to Arriaga, Aug. 27, 1769."

<sup>405</sup> AGI, Mexico, 1265, "Cruillas to Arriaga," March 20, 1766; AGI, Mexico, 1265, "Cruillas to Arriaga, March 20, 1766." See also Herbert Ingram Priestley, *José de Gálvez, Visitor-General of New Spain (1765-1771)* (Philadelphia, 1980 (1916)), 130-132.

<sup>406</sup> That Gamboa himself probably supported Cruillas is suggested by the fact that Cruillas, in his residencia, chose Gamboa's intimate associates, the Basque merchants Manuel Aldaco and Ambrosio Meave, as two of his apoderados. "Residencia of Cruillas."

<sup>407</sup> AGI, Mexico, 1369, "Croix to Arriaga," Aug. 27, 1769; "Croix to Arriaga, Aug. 31, 1767."

<sup>408</sup> AGI, Mexico, 2778, "Arriaga to Croix," March 22, 1768; AGI, Mexico, 2778, "Arriaga to Croix, March 22, 1768."

<sup>409</sup> "Arriaga to Croix, March 22, 1768."

<sup>410</sup> The expulsion of the political opponents of the visita was first studied by Luis Navarro García. See Luis Navarro García, "Destrucción de la oposición política en México por Carlos III," *Anales de la Universidad Hispalense* XXIV (1964).

<sup>411</sup> Osoreo, *Noticias bio-bibliográficas*, II: 47-57. López Portillo had first been denied a position on the cathedral chapter by archbishop Rubio y Salinas on the grounds of an illegitimate birth. The crown

According to testimony taken by archbishop Lorenzana, Gamboa's personal scribe, Tiburcio Martínez, had frequented the priest's home and saw there writings critical of the archbishop and his handling of the Jesuits.<sup>412</sup> Gamboa himself did not testify nor was implicated in the composition of pro-Jesuit propaganda. He could not, however, escape guilt by association, especially after a German priest in New Spain, Adolfo Falembock, warned Lorenzana of a brewing conspiracy against Spanish rule among disaffected Mexican and Peruvian creoles allied with Britain.<sup>413</sup> It was an unfounded accusation but it provided the pretext for Gálvez, Croix and Lorenzana to clean house in New Spain.

The government of Charles III took reports of unrest in New Spain seriously, especially in light of the recent turmoil in Madrid and other cities of Spain. The special committee of the Council of Castile that had handled the investigation into the Madrid riots of March 1766 took charge of the situation in New Spain, thus circumventing the Council of the Indies.<sup>414</sup> Charles's new chief minister, the conde de Aranda, headed this body, which included two ambitious crown attorneys, Campomanes and Moñino. They released their opinion on New Spain on March 5, 1768. They accepted the word of Croix and Lorenzana that New Spain teetered on the brink of revolt. Without referring to Gamboa by name, the attorneys warned of the special danger posed by obstreperous judges, who, they wrote, are "the most pernicious, for the authority they hold in their hands and the impediments they can put before the measures of the Viceroy."<sup>415</sup> They recommended the immediate dispatch of troops, the extirpation of all Jesuit literature, and

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intervened and ordered the bishop to appoint him a minor canon (*ración*) in June 1764 and to bury the evidence of his illegitimate birth. AGI, Mexico, 1701, "Cédula, June 2, 1764."

<sup>412</sup> AGI, Mexico, 2778, "Lorenzana to Arriaga," Nov. 21, 1767; AGI, Mexico, 2778, "Lorenzana to Arriaga, Nov. 21, 1767."

<sup>413</sup> AGI, Mexico, 2778, "Lorenzana to Arriaga," Dec. 1, 1767; AGI, Mexico, 2778, "Lorenzana to Arriaga, Dec. 1, 1767."

<sup>414</sup> Priestley, *Gálvez*, 209.

<sup>415</sup> AGI, Mexico, 2778, "Opinion of Special Council, March 5, 1768."

the expulsion without delay of all potential troublemakers. The special committee as a whole endorsed their opinion.

Unlike Croix and Gálvez, however, Campomanes and Moñino acknowledged the legitimacy of creole grievances:

How can they love a Government that they accuse of mainly trying to extract from there just taxes and profits... and that everyone who goes there from here has no other purpose than to enrich themselves at their expense?

They sketched out a number of proposals to foster a renewed spirit of unity in the empire. These included a moratorium on new taxes; improving administrative efficiency; implementing free trade between Spain and Spanish America; reforming customs duties at Cadiz; inviting more creoles to Spain to study, serve in the military, and hold government office. Campomanes and Moñino even suggested allowing the American kingdoms to send deputies to Spain to participate in imperial decision-making. Bringing Americans to Spain, they promised, “would form a single Nation,” with the creoles in Spain serving effectively as “hostages, in order to retain those countries under the suave dominion of His Majesty.”<sup>416</sup> Although utopian (who would pay for the transatlantic travel their proposals entailed?), the March 1768 opinion by Campomanes and Moñino signaled that counter-currents against the aggressive colonial reforms directed by Gálvez were beginning to flow at the highest level of government.

In New Spain, Croix, Gálvez and Lorenzana bobbled the plan to ship the suspect government and church officials out without delay. In contrast to the secrecy with which the Jesuit expulsion had been planned, word quickly leaked out to the nine men on the list: Gamboa, Velarde and Fernández de Madrid from the Audiencia; Rafael Rodríguez Gallardo, Alonso de Mella, Martín de Azpiroz and Ignacio Negreiros from other secular offices; and the churchmen López Portillo and Ignacio Ceballos. Without the element of

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<sup>416</sup> AGI, Mexico, 2778, "Opinion of Special Council," March 5, 1768.



surprise, Croix and Lorenzana reckoned it too dangerous to move against them. At the same time, by the summer of 1768, tempers had cooled in the capital. Lorenzana especially urged caution.<sup>417</sup>

When Croix wrote to Madrid for further instructions, Campomanes and Moñino also counseled prudence.<sup>418</sup> They recognized the lack of concrete evidence against most of the officials, including Gamboa. It was necessary to keep it a political matter, and not allow the suspects to challenge the orders of removal in court. It would be best, they concluded, to treat the expulsions as invitations to serve the king in Spain, a convenient fiction that would protect the reputations of the affected ministers. It would also fit into the plan sketched out in March 1768 to encourage the appointment of creoles to official positions in Spain. On January 25, 1769 the crown expedited new orders to Croix. Gamboa received his official notice to report to duty in Spain on August 7, 1769.

Gamboa informed Madrid that he was “blindly and humbly resigned to comply with the sovereign will of the king, even in the midst of the great difficulties of his family.”<sup>419</sup> By 1769 his household consisted of his wife, María Manuela, two sons, four daughters, at least one sister, and one orphaned niece.<sup>420</sup> Not only would he have to abandon them, he would have to liquidate assets in order to pay for his own travel and expenses as well as the upkeep of his family during his absence.<sup>421</sup> He sold his investment in a trading company to his friend Meave for nineteen thousand pesos.<sup>422</sup> He held a virtual fire sale of domestic objects, including silver plates, jewelry, and his mules

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<sup>417</sup> AGI, Mexico, 2778, "Lorenzana to Croix, July 19, 1768."

<sup>418</sup> AGI, Mexico, 2778, "Opinion of Special Council," Jan. 6, 1769; AGI, Mexico, 2778, "Opinion of Special Council, Jan. 6, 1769."

<sup>419</sup> AGI, Mexico, 2778, "Gamboa to Croix, Aug. 7, 1769."

<sup>420</sup> AGI, Mexico, 2778, "Urrutia to Arriaga," Dec. 1, 1770; AGI, Mexico, 2778, "Urrutia to Arriaga, Dec. 1, 1770."

<sup>421</sup> AGI, Mexico, 2778, "Royal Order, Nov. 23, 1769."

<sup>422</sup> "Escriptura, 1769."

and coach. Most painfully, he sold many of his books to Croix and Lorenzana, thereby “deflowering its best editions,” in his words, “from one of the most complete Libraries of Mexico, built over many years from my sweat.”<sup>423</sup> With a chest of silver pesos, Gamboa and his older son, Juan José, along with two servants, left New Spain in December 1769. In Havana they transferred to a tobacco packet, the *Santísima Trinidad*, which arrived in Vigo on April 13, 1770.<sup>424</sup> Exile was a bitter experience for Gamboa. For the next three years he incessantly protested his innocence and pleaded to be restored to the Audiencia of Mexico.

## Conclusion

The marqués de Croix’s desire to clamp down on crime and disorder in New Spain in the late 1760s was certainly understandable. After the Havana occupation in 1762 and its triumph in the Seven Years’ War, Britain seemed poised to take advantage of any weakness in the Spanish empire. At the same time, the riots in Madrid in early 1766 gave the ministers of Charles an indication of the dangers of urban unrest. Croix’s decisions to fire the corrupt police force controlled by the Audiencia of Mexico in Puebla and to replace punishment in private work places for labor on military fortifications also were defensible in the context of the times. The Sala de Crimen’s argument that such actions contravened established custom and offended its dignity might have seemed a bit frivolous at a moment of peril for New Spain. The viceroy was trying to reestablish order in the viceroyalty and the *alcaldes del crimen* were worried about their lost income from the inherently abusive practice of selling convicts to the highest bidder.

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<sup>423</sup> AGI, Mexico, 2778, “Gamboa to Arriaga, Aug. 25, 1772.”

<sup>424</sup> AGI, Mexico, 2778, “Gamboa to Arriaga, April 13, 1770.” Among the items in Gamboa’s possession upon arrival in Vigo were two thousand pesos in coins, three boxes of books and papers, two shotguns, a lot of Mexican sweets and chocolate, and one hundred and eighty tins of snuff: AGI, Mexico, 2778, “Gamboa’s Inventory, April 21, 1770.”

Yet decisions made at moments of perceived crisis have long-term and unexpected consequences. Croix's activism in the field of criminal law was just one example during the years of the visita in which the old habits of governance and the traditional standards of law broke down. By failing to honor the ministers of the Audiencia and breaching the court's jurisdiction, Croix contributed to the erosion of judicial power in New Spain. The Audiencia was the guardian of the old ideal of Spanish justice in America. This encompassed special protection for the Indians and scrupulous attention to court procedure. The court enjoyed constitutional autonomy from the viceroy, who might serve as its honorary president but had no legal authority to intervene in judicial matters. To weaken the court altered the balance between executive and judicial authority. The key intermediate institution in the government, able to call to account all other bodies on the basis of its supervision over law, suffered a serious setback. To compound the audiencia's loss of clout, Croix empowered the Acordada, a tribunal specifically authorized to act without procedural niceties or Audiencia oversight. Although the process took decades to complete, in large part due to the spirited resistance of judges like Gamboa, already in the 1760s the outlines of a more coercive, less restrained polity began to emerge in New Spain.

## Chapter Six: Mexican Silver and the Contest over Law, 1761-1790

Being that Mining is the Origin and unique source of the monetary wealth that gives spirit and movement to the other occupations of men and to the universal commerce of the known world, justice demands that it receives the principal attentions of the Government; and that it should always be treated with the particular care and attention that Our Majesty the King today is showing it.<sup>425</sup>

*José de Gálvez, 1771*

### Introduction

The story of the Mining Tribunal pulls together many strands in the overall process of Caroline reform in New Spain. The establishment in the late 1770s of a self-governing association of miners, with control over their own court, bank and technical college, represented an attempt to impose a new legal and institutional order over silver mining, New Spain's most important industry and a vital contributor to the royal treasury. It reflected the disdain of José de Gálvez, the scheme's biggest champion, for the legal and institutional status quo in New Spain: the reform entailed the abrogation of the 1584 Mining Ordinances praised by Francisco Xavier Gamboa in the *Comentarios a las Ordenanzas de Minas* and the exclusion of mining from the jurisdiction of the Audiencias of New Spain, where it had resided for over two hundred years. In pushing through the Tribunal, Gálvez, newly minted as the secretary of state for the Indies in 1776, disregarded the opinion of many experienced officials, both in Mexico and Madrid. In so doing, he dismissed arguments that justified existing practices on the basis of their adaptation to the peculiar conditions of America, which he considered rationalizations for

corruption. In establishing a guild for miners in New Spain (which it soon duplicated in Peru), the government of Charles III also showed its schizophrenic attitude towards privileged corporations: some were good, the ones that could improve the crown's political control and fiscal take, and others were bad, such as the old merchants' consulados of Cadiz, Mexico City and Lima, whose power sometimes rivaled that of the crown.<sup>426</sup> Economic liberalism was always selectively applied by Caroline reformers.

The story of the Mining Tribunal, which this chapter examines, also illustrated the breadth of the reform debate, which historians have inadequately portrayed. It did not pit reformers versus reactionaries or peninsulares versus creoles. Rather, the opponents of the official program associated with Gálvez, Spaniards and Americans alike, floated their own reform ideas, united in their commitment to improving the health of Mexican silver mining for the sake of bolstering royal finances. The crown had an ample menu of reform options, from the minimally interventionist approach recommended by Tomás Ortiz de Landázuri, the contador-general of the Council of the Indies, to the radical surgery advocated by Gálvez. Ironically, the only Caroline minister of influence who went on record opposing reform was Pedro Rodríguez Campomanes, the most literate in the new field of political economy.

Gamboa again played a fundamental role. His *Comentarios* provided the most detailed diagnosis of the ailments of the industry and a blueprint for moderate reform,

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<sup>425</sup> José de Gálvez, *Informe del marqués de Sonora al virrey don Antonio Bucarely y Ursúa* (México, 2002), 64.

<sup>426</sup> On mining reform in Peru see John R. Fisher, *Silver Mines and Silver Miners in Colonial Peru, 1776-1824* (Liverpool, 1977). On the campaign against the Lima consulado see Patricia H. Marks, "Confronting

built on existing law and institutions. Restored to the Audiencia of Mexico as an oidor after his unhappy exile to Spain in the early 1770s, he led the opposition to the Tribunal. His renewed antagonism towards the policies of Gálvez resulted in a second removal from New Spain in the 1780s. During his absence, the Tribunal collapsed, undone by financial mismanagement. The failure of the Tribunal exemplified many of the shortcomings of the overall Caroline reform program. On the other hand, Gamboa's return to New Spain in 1788 as the regent, or chief justice, of the Audiencia of Mexico, symbolized the resilience of the old legal order in Spanish America.

### **To save or abandon the silver mines of America?**

Gamboa's *Comentarios a las Ordenanzas de Minas* was not just a lucid analysis of the governing Mining Ordinances of 1584; the legal text also diagnosed the economic ills afflicting the industry and prescribed remedies. Gamboa claimed that mining in New Spain was becoming more difficult and expensive, with the depletion of accessible, higher-grade surface deposits. Miners had to dig deeper, which required more workers, more sophisticated techniques, and greater quantities of blasting powder. The ore excavated at depth was also usually lower grade, making it less suitable for smelting. Miners needed supplies of expensive mercury to refine the silver ore. To compound these difficulties, the deeper miners dug, the more they had to contend with water. Of the one hundred or so mining camps Gamboa described in the last chapter of the *Comentarios*, he reckoned that almost forty had been partially or totally flooded.<sup>427</sup>

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a Mercantile Elite: Bourbon Reformers and the Merchants of Lima, 1765-1796," *The Americas* 60 (April, 2004).

<sup>427</sup> Gamboa, *Comentarios*, 501-510.

To move the government of Charles III to address the challenges facing novohispano miners, Gamboa first had to convince it that silver mining in America was worth saving. Spanish economic reformers allied with the Bourbons believed that the gold and silver mines of the Indies had been, at best, a mixed blessing for Spain and, at worst, the main cause of the country's economic backwardness. As early as 1600 the *arbitrista* Martín González de Cellorigo stated:

Our Spain has its eyes so fixed on trade with the Indies, from which it gets its gold and silver, that it has given up trading with its neighbors; and if all the gold and silver that the natives of the New World have found, and go on finding, were to come to it, they would not make it as rich or powerful as it would be without them.<sup>428</sup>

Spaniards of the seventeenth century realized that the flow of American silver triggered inflation in the Peninsula and sapped the competitiveness of its industries. It flowed through Spanish hands, ending up financing capitalist development in northern Europe.<sup>429</sup>

Feijóo, a harsh critic of Spain's obsession with American precious metals, charged that:

The gold of the Indies makes us poor. But this is not the worst of it, as the gold enriches our enemies. For having mistreated the Indians, we Spaniards are now the Indians of the Europeans. For them we dig our mines and for them we bring our treasures to Cadiz.<sup>430</sup>

In the opinion of many informed observers in the seventeenth and eighteenth centuries, Spaniards had to wean themselves off of American gold and silver if they were to rejuvenate their domestic economy.

Campomanes, the main economic advisor of Charles III, shared this view. He looked at the prosperity of Britain, which possessed no mines, and concluded that precious metals were not essential commodities. A country could replace them, as Britain

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<sup>428</sup> Quoted in Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830*, 26.

<sup>429</sup> On the economic effects of American silver on Spanish and European economic development see Stein and Stein, *Silver, Trade and War*.

<sup>430</sup> Quoted by Gamboa, Gamboa, *Comentarios*, 79.

had done, with paper money.<sup>431</sup> In attacking Gamboa's plan for a mining bank, Campomanes wrote that, "when a branch of industry produces freely, it is a fundamental maxim of Government not to meddle, especially if it would undermine liberty."<sup>432</sup> He prescribed a policy of indifference towards the Mexican mines. To jump start the imperial economy, he focused on the need to liberalize trade between Spanish and American ports, a policy finally implemented in 1778 by Gálvez.<sup>433</sup>

Campomanes and Feijóo represented the prevailing metropolitan view. Gamboa, however, spoke from the periphery. Americans should not be blamed if Spaniards squandered silver by consuming foreign manufactured items rather than investing it in domestic factories.<sup>434</sup> The crown should help mining no matter the economic consequences in Spain, as its central function was anchoring the economy of New Spain, the monarchy's most valuable American possession. Gamboa painted a picture of the multiple benefits of mining for the viceroyalty:

Mineral districts of gold and silver give rise to towns, towns promote the civilization and settlement of the Indians; then follow consumption, industry, imports and many other consequences, of the greatest importance to religion and the state.<sup>435</sup>

A wealthy New Spain, built on a flourishing mining industry, sustained by haciendas, plantations and workshops, would naturally reward Spain with loyalty, taxes and trade. In fact, if the crown concentrated on fixing what was wrong in Mexican mining, Gamboa

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<sup>431</sup> Campomanes, "Del beneficio de las minas...", 442. Adam Smith, in his famous attack on mercantilism, wrote: "Upon every account, therefore, the attention of the government never was so unnecessarily employed, as when directed to watch over the preservation or increase of the quantity of money in any country." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (New York, 1994), 465.

<sup>432</sup> Campomanes, "Del beneficio de las minas...", 443.

<sup>433</sup> Campomanes and Llombart Rosa, *Reflexiones sobre el comercio español a Indias (1762)*.

<sup>434</sup> Gamboa, *Comentarios*, 79. He wrote: "Pues la labor de las Minas no influye en esa distribución, como enriquecen a los extraños, pudieran enriquecer a los Españoles, si no dexaran ir el Oro y Plata de entre las manos, por las manufacturas, que nos franquen."

<sup>435</sup> *Ibid.*, 80.



claimed it could achieve its goal of raising fiscal revenues without having to resort to difficult tax increases or disruptive institutional reforms.

Gamboa had one important ally in convincing the Spanish crown of the need to help Mexican miners: José de Gálvez. In his 1771 final report as visitor-general, he praised mining in almost mystical terms as “the origin and unique source of the monetary wealth that gives spirit and movement to all the other occupations of mankind.”<sup>436</sup> Although his rhetoric harkened back to the bullionist notion that a nation’s wealth and power derived from its stock of precious metals, Gálvez, as a former treasury official, knew the real importance of the American mines to the monarchy. Whatever the damage to the domestic Spanish economy, the flow of silver to Cadiz remained essential to royal finances, with America still contributing about a fifth of Spanish treasury receipts.<sup>437</sup> Gálvez shared Gamboa’s desire to help Mexican mining but less on the basis of the industry’s dynamic role in the novohispano economy and more on the fiscal needs of the crown. The distinction made a difference in the conception of reform plans.

### **Gamboa’s diagnosis and prescription**

Gamboa’s economic program for mining was consistent with his legal thinking. He believed that reform could be carried out within the existing institutional framework, based on the Mining Ordinances of 1584. This stature empowered individuals to pursue their economic self-interest for the good of the community as a whole.<sup>438</sup> Since the public benefited from the extraction of metals, “it was necessary to reward the one who put the

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<sup>436</sup> Gálvez, *Informe del marqués de Sonora al virrey don Antonio Bucarely y Ursúa*.

<sup>437</sup> Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830*, 374; Marichal, *La bancarrota del virreinato. Nueva España y las finanzas del Imperio español, 1780-1810*, 32.

<sup>438</sup> For discussions of the recognition of the social benefits of economic self-interest prior to Adam Smith see Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before its Triumph*, Twentieth anniversary ed. (Princeton, NJ, 1996).

most care and effort into the search and excavation of mineral veins.”<sup>439</sup> The first step in making the industry more prosperous, which the *Comentarios* addressed, was to educate miners, lawyers and officials on their rights and obligations under the law, especially those pertaining to property rights.<sup>440</sup> The second step was to introduce a few modest innovations, none of which would cost miners or the crown much money.

The mining bank, for instance, would piggyback on the expertise and administration of the consulado of Mexico.<sup>441</sup> It would institutionalize an existing relationship between miners and merchants, for the sake of lowering the risk of investment in mine projects. It would also spare miners the expense in both time and money in setting up their own financing arm. Gamboa, who continued to promote the idea in his decades on the Audiencia of Mexico, believed the crown should look favorably on a proposal that would help keep miners in the field while allowing merchants to invest their profits in other productive sectors of the economy.<sup>442</sup> It would stimulate the overall economy of New Spain and thus raise tax revenues for the crown. That it might also increase the leverage of the merchants of Mexico City was, to Gamboa, a minor consideration.

Just as Gamboa believed the legal order should be flexible enough to accommodate local variations, he saw the advantage in local economic autonomy. His support for mercury mining within New Spain exemplified his vision of a largely self-sufficient Mexican economy within a loose imperial structure. At least in this regard, he

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<sup>439</sup> Gamboa, *Comentarios*, 293. The original: “...porque siendo publica la utilidad de la extracción de los metales, fue preciso premiar al que pusiese mas cuidado y diligencia en indagar y ahondar la veta...”

<sup>440</sup> I refer particularly to Ordinances 7-9 (registration), 16 (freedom to prospect on others’ property), 22-27 (duty to stake claims), 30 (freedom to follow veins), and 37 (duty to work claims to maintain valid registration).

<sup>441</sup> I discuss the mining bank in greater detail in chapter three.

<sup>442</sup> Gamboa still promoted the idea in 1790 as the best solution to finance mines. AGI, Mexico, 2238, “Opinion of Gamboa on Mining Tribunal, January 1, 1790.”

wanted a radical change in the institutional structure of the industry. Allowing mercury mines in New Spain, where he claimed many promising deposits had been found, would break the crown-protected monopoly that the Almadén mine in central Spain enjoyed over the market.<sup>443</sup> Mercury arrived in special ships at Veracruz and was distributed to miners at local treasury offices. (Peruvian miners sourced their mercury from the local crown-operated Huancavelica mine.) Because the crown monopoly produced reliable profits and made it easy to monitor silver production, the crown resisted calls to loosen control. To further his case, Gamboa cited a 1727 report signed by the viceroy, the marqués de Casafuerte, which claimed that the crown monopoly violated the freedom to mine guaranteed in the 1584 Ordinances.<sup>444</sup>

The crown allowed prospecting for mercury in New Spain when war disrupted the Atlantic shipping routes. In 1778, for instance, the Spanish government authorized an expedition by the German mining expert, Rafael Helling, to assess potential mines.<sup>445</sup> José Antonio de Alzate, the scientifically-minded priest and friend of Gamboa, accompanied Helling as mapmaker and report writer.<sup>446</sup> Yet like all searches in the colonial era, this mission failed to turn up anything worth developing. The real problem in making New Spain, like Peru, self-sufficient in mercury, was geological, not political. The viceroyalty simply lacked viable deposits. Into the nineteenth century, Mexican silver production remained as bound as ever to Almadén.<sup>447</sup>

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<sup>443</sup> On the state mercury monopoly see Antonia Heredia Herrera, *La renta del azogue en Nueva España: (1709-1751)* (Seville, 1978); M. F. Lang, *El monopolio estatal del mercurio en el México colonial, 1550-1710* (México, 1977). The Almadén mine, near Ciudad Real in central Spain, contains the world's largest reserve of cinnabar, a mineral from which mercury is extracted. The mine, which was founded by the Romans, finally shut down in 2000.

<sup>444</sup> Gamboa, *Comentarios*, 46-55.

<sup>445</sup> AGI, Mexico, 2240, "Report by Tribunal on mercury mining, Aug. 26, 1777."

<sup>446</sup> Moreno, "Un eclesiástico criollo frente al estado borbón," 22-23.

<sup>447</sup> AGI, Mexico, 2237, "Tribunal report on mercury, Aug. 31, 1818." The report concluded: "...haviendo hecho reconocer con toda prolixidad los diferentes parages de este Reyno en que se manifestaban indicios de algun criadero de él, no se encontró ninguno que tubiera formalidad, resultando lo mismo de iguales

Gamboa was one of many who thought the price miners paid for mercury was too high. Yet he did not call for a general price reduction, perhaps because monopoly administrators had always defeated such proposals in the past.<sup>448</sup> Instead, he suggested the crown offer selected discounts to miners engaged in expensive rehabilitation work. Whatever income the crown would lose in mercury sales, it would more than make up on fiscal revenues from increased silver production. This approach accorded with Ordinance 76, which allowed preferential tax treatment for older and deeper mines.<sup>449</sup> This provision had never been put into practice, according to Gamboa, with the result that “the most flourishing riches have been buried and lost in the waters of the old mining areas, with harm to the king and the kingdom.”<sup>450</sup>

Gamboa was overly cautious. An across-the-board price reduction, which would benefit all miners, had an influential champion in Gálvez. As early as 1759, in his *Discurso* on American policy, he stressed the need for a cheaper and more reliable supply of mercury.<sup>451</sup> Further support came from the committee struck in 1764 to consider changes in the transatlantic trade regime.<sup>452</sup> In 1767, as visitor-general of New Spain, Gálvez sponsored a petition prepared by Joaquin Velázquez de León, Juan Lucas de Lassaga and José de la Borda for a general fifty per cent price cut.<sup>453</sup> The crown

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investigaciones y trabajos particulares emprendidos en otras por la Minería de Guanajuato: quedando de consiguiente pendiente siempre dicha provision del unico recurso de las Minas del Almaden.”

<sup>448</sup> José Sánchez de Villaseñor, accountant of the mercury monopoly in New Spain and author of the *Theatro americano*, a geographic survey of New Spain published in 1748 and used extensively by Gamboa in the *Comentarios*, thwarted the campaign in the 1740s by José de la Borda to lower prices. Gamboa, *Comentarios*, 57.

<sup>449</sup> Ibid., 59.

<sup>450</sup> Ibid. The original: “...es una Ley y Ordenanza, que está en su fuerza y vigor, y no derogada ni abrogada; que acaso, por no haberse reducido a practica, se han sepultado y confundido entre las aguas de Minerales antiguos, las riquezas mas florecientes, en perjuicio del Rey y del Reyno.”

<sup>451</sup> “Discurso y reflexiones de un vasallo sobre la decadencia de Nuestras Indias.”

<sup>452</sup> AGI, Mexico, 2240, “Opinion of Landázuri on mercury prices, Feb. 9, 1776.”; Stein and Stein, *Apogee of Empire*, 70-74.

<sup>453</sup> AGI, Mexico, 1266, “Representation on Mercury Prices, March 28, 1767.”

consented to a twenty-five per cent reduction, dropping the price from eighty to sixty pesos per hundredweight. A decade later, in 1776, after Gálvez took over the secretary of state for the Indies, the crown cut prices again, to the forty pesos originally requested in 1767.<sup>454</sup> This still left the crown a decent profit margin, since the cost base was just over twenty pesos per hundredweight. Perhaps nothing the crown did in these years had a more positive impact on silver production in New Spain.

Thanks to Gálvez's backing, the crown embraced a second proposal Gamboa advanced in the *Comentarios*, that miners undertaking expensive rehabilitation projects should receive tax breaks and other concessions.<sup>455</sup> Ordinance 79 imposed a positive duty on miners to build adits, or drainage tunnels. Few could comply with this law, however, because of the monumental expense of digging such tunnels. Beginning in the late 1760s, the crown, through the viceroy, began to offer packages of concessions, on a case-by-case basis, modeled on the original Bustamante agreement of 1739. Miners typically received mercury at cost and exemptions from royalty payments for specified periods. One of the first beneficiaries was Borda, who petitioned the crown in 1768 for assistance in saving Quebradilla in Zacatecas.<sup>456</sup> Throughout the 1770s and 1780s, the crown subsidized a large number of projects, eventually developing criteria to determine the correct level of support for each case.<sup>457</sup>

Gamboa saw no need for either radical reform to stimulate mining or further legal privileges for miners. He had pointed out in the *Comentarios* the irrelevancy of the

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<sup>454</sup> Stein and Stein, *Apogee of Empire*, 236. Gamboa opposed this second cut, arguing it was unnecessary. The influence of his friend Valcárcel, the head of the mercury monopoly, might be seen here.

<sup>455</sup> Gamboa, *Comentarios*, 481-482.

<sup>456</sup> AGI, Mexico, 2235, "Opinion of Landázuri on Quebradilla, Nov. 21, 1767."; AGI, Mexico, 2235, "Royal approval for Quebradilla rehabilitation, March 12, 1768." See D. A. Brading, "Mexican Silver-Mining in the Eighteenth Century: The Revival of Zacatecas," *The Hispanic American Historical Review* 50: 671.

<sup>457</sup> Material on these agreements with private miners is collected in AGI, Mexico, 2242. The various agreements were reviewed in the early 1790s as part of the *arreglo* of the Tribunal.

privileges accorded miners in the Ordinances, such as the right to hunt and fish freely in the vicinity around mines.<sup>458</sup> Individuals mined to get rich; positive inducements were superfluous. Gamboa also believed that existing institutions could address all of the problems facing miners. The consulado could provide financing, the Audiencias an authoritative forum for dispute resolution, and the university the education needed for mine engineers and surveyors. These bodies would give miners the freedom to devote themselves to their area of expertise, the discovery and exploitation of mineral resources. Gamboa's economic program, like his legal thinking, was premised on his faith in the existing institutions of New Spain, especially the Audiencia and the legal system it upheld.

### **The program of Gálvez: the Mining Tribunal**

Despite his agreement with Gamboa on many mining issues, such as the need for lower mercury prices and government aid for rehabilitation projects, Gálvez approached mining reform from a radically different premise. He believed the whole legal and institutional framework of the industry required a drastic overhaul. He became convinced that the existing system disadvantaged miners. In 1767 he commented that, "it is necessary to promote a class of workers that the universal constitution of the world has made so worthy, as they provide, with their work and sweat, necessary sustenance of the first order."<sup>459</sup> In his final report as visitor-general, in December 1771, he lamented:

The prejudicial discredit in which Miners find themselves as a profession, the affronts and extortions they suffer from the ordinary Judges and their subalterns in the legal matters they pursue before them, the losses they continually live exposed

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<sup>458</sup> Gamboa, *Comentarios*, 373.

<sup>459</sup> AGI, Mexico, 1266, "Gálvez to Arriaga, March 31, 1767." The original: "...ha de fomentarse una clase de labradores que la constitucion universal del mundo ha hecho tan recomendables, como los que proveen, con su trabajo y sudor, los alimentos de primera necesidad."

to from the ignorance, disorder and thievery of mine workers, and, above all, the fatality of the best mines being suddenly abandoned for the lack of capital.”<sup>460</sup>

In order to energize the miners, it was necessary in Gálvez’s mind to promote their independence, by giving them control over their own self-governing organization. This guild, or as it became known, the Mining Tribunal, would assume the legal, financial and educational functions controlled by institutions that had failed to treat miners with the respect they deserved. It would also allow the political ministers of the crown to exert greater control over the industry, by removing jurisdiction over it from the stubbornly independent Audiencia.

Part of Gálvez’s mandate as visitor-general was to pay “particular attention to the equipment and working of the mines, their condition, the care taken in the collection of the royal fifths, and whether the supplies of mercury are furnished to mines as they are necessary, and by what means the production of precious metals may be made more copious.”<sup>461</sup> His main advisor in these matters was Joaquín Velázquez de León, like a Gamboa a creole lawyer with scientific interests.<sup>462</sup> In the mid 1760s he came to the attention of the visitor-general when he and Juan Lucas de Lassaga, a Spanish miner, sought official backing for their metallurgical experiments.<sup>463</sup> Velázquez de León and Lassaga presented themselves as representatives of the mining industry, the leaders of the *gremio de los mineros*, as they put it in their 1767 mercury price petition.<sup>464</sup> Velázquez de León accompanied Gálvez on an expedition to the Californias and Sonora from 1768 to 1770, where he investigated mineral deposits and charted astronomical phenomena. The two men must have talked at length about establishing a formal association for miners.

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<sup>460</sup> Gálvez, *Informe del marqués de Sonora al virrey don Antonio Bucarely y Ursúa*, 70.

<sup>461</sup> Instructions, March 16, 1765, quoted and translated by Priestley, *Gálvez*, 416-417.

<sup>462</sup> On Velázquez de León see Roberto Moreno, *Joaquín Velázquez de León y sus trabajos científicos sobre el valle de México, 1773-1775* (México, 1977), 21-44.

<sup>463</sup> AGI, Mexico, 2235, "Opinion of contador-general, Aug. 1, 1768."

<sup>464</sup> "Representation on Mercury Prices, March 28, 1767."

When Gálvez returned to Spain at the beginning of 1772, he promised to promote the idea.

At the end of the visita, however, New Spain did not seem ready for more of the radical reform favored by Gálvez. To replace the marqués de Croix, Madrid chose as viceroy Antonio Maria de Bucareli, the former captain-general of Cuba. Bucareli restored to New Spain a more moderate and conciliatory government, in line with what Campomanes and Moñino had previewed in their 1768 opinion on the troubles in New Spain. Bucareli's style was also consistent with the best practices of *Derecho Indiano*. The new viceroy held as "one of the principal maxims of good government, not to introduce novelties in the old customs, when they are not iniquitous."<sup>465</sup> He consulted with local experts, especially the ministers of the Audiencia. As captain-general of Cuba he had observed closely developments in New Spain, complaining often to Madrid about Croix and often questioning the policies of the visitor-general.<sup>466</sup> He said of the visitor-general's 1768 plan to establish the intendancy system in New Spain, "Nothing is so easy as proposing reforms, and nothing so difficult as adapting them to make them work."<sup>467</sup> He was a conservative pragmatist, valuing local expertise and wary of radical innovation.

Bucareli began his tenure with a major disagreement with Gálvez over mining policy. Once again the trouble was Real del Monte. Pedro Romero Terreros, ennobled as

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<sup>465</sup> AGI, Mexico, 1129, "Bucareli to crown, Dec. 24, 1771." The original: "Que tenia por una de las principales máximas del buen gobierno no hacer novedad en las costumbres antiguas, quando ellas no eran pecaminosas..." This letter is also included in *La administración de D. Frey Antonio María de Bucareli y Ursua, cuadragesimo sexto Virrey de México, Tomo II*, (México, 1936), 360-376.

<sup>466</sup> RAH, Bucareli Correspondence, 4308, "Bucareli to Arriaga, Sept. 8, 1771." He expressed his reservations about many things in Gálvez's final report. RAH, Bucareli Letters, 4309, "Bucareli to Arriaga, February 22, 1772." After 1776, when Gálvez became minister of the Indies, Bucareli became very careful in his correspondence. He wrote in a personal letter to Antonio de Ulloa, the naval commander and close friend: "... yo he dejado de todo lo que no es de ministerio para evitar sospechas, con mas cuidado después de la muerte de Bailio Arriaga que fue mi amigo." He desperately wanted to retire after 1776 and return to his native Andalusia. Solano, *Antonio de Ulloa y la Nueva España : descripción geográfico-física de una parte de la Nueva España de Antonio de Ulloa, y su correspondencia privada con el virrey don Antonio María de Bucareli*, 135.

<sup>467</sup> AGI, Mexico, 1241, "Bucareli to Muzquiz, July 27, 1772."



the conde de Regla in 1768, had never accepted Gamboa's 1766 settlement.<sup>468</sup> He refused to return to active management of his mines along the veta vizcaína until the crown accepted the abolition of the partido. In 1771, Gálvez, who had praised Gamboa's mediation back in 1766, backed Regla. He advised the crown to outlaw partidos as a measure to stimulate investment and mine production.<sup>469</sup> His protégé Areche, the crown attorney appointed by Croix, faulted Gamboa for not taking the same iron-fisted approach to the rioting workers that Gálvez had used against pro-Jesuit protestors in 1767.<sup>470</sup>

After consulting with local officials, including Domingo Valcárcel, the senior oidor on the Audiencia, administrator of the mercury monopoly, and close friend of Gamboa, Bucareli judged that the prohibition of partidos would be disastrous for mining and New Spain. In a powerful letter to Madrid in December 1771, the viceroy lambasted Gálvez's advice. He predicted a general revolution in the mining districts in the event partidos were banned. "While it is true that the mine workers have no legal right to partidos," the viceroy conceded, "it is what custom dictates, and there is no law or ordinance prohibiting them."<sup>471</sup> Partidos were an established part of the industry, the best incentive to engage in dangerous work, and helpful as well to small mine owners without ready cash to pay laborers.<sup>472</sup> Bucareli suggested the drafting of a new set of labor regulations for the industry, modeled on what Gamboa had written for Real del Monte. In 1773 he invited miners to send representatives to Mexico City to discuss labor relations and other issues of concern.<sup>473</sup>

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<sup>468</sup> Ladd, *Making of a Strike*, 85-87.

<sup>469</sup> AGI, Mexico, 1129, "Gálvez to crown, Feb. 17, 1771".

<sup>470</sup> AGI, Mexico, 1129, "Opinion of Council of the Indies on Real del Monte, June 12, 1773."

<sup>471</sup> "Bucareli to crown, Dec. 24, 1771."

<sup>472</sup> Bucareli's opinion in the letter of December 1771 closely matched the earlier opinion of the Acuerdo of the Audiencia on this issue. AGI, Mexico, 1129, "Acuerdo on Real del Monte," 1771.

<sup>473</sup> *La administración de D. Frey Antonio María de Bucareli y Ursua, cuadragesimo sexto Virrey de México, Tomo II*, 374. Walter Howe, *The Mining Guild of New Spain and its Tribunal General, 1770-1821* (New York, 1949), 38-39.

Bucareli inadvertently opened the door for radical reform by convoking an assembly of mining representatives. Gálvez's allies Velázquez de León and Lassaga seized the agenda and pushed hard for the Mining Tribunal. In February 1774 they formally presented their plan to the crown.<sup>474</sup> They called for an organization with jurisdiction over judicial, financial and technical matters, led by a board of directors that they would lead for life. Each mining district would elect two deputies to adjudicate disputes, assess loan applications, and attend annual meetings in Mexico City. The directors would hear judicial appeals, manage the bank, and oversee a technical college. To finance this ambitious organization, the self-proclaimed leaders of the mining community proposed that the crown assign it half of the income from seignorage.<sup>475</sup> This would generate an estimated annual income of two hundred thousand pesos, enough to cover operating expenses and pay interest of five per cent per annum to shareholders of the bank. Velázquez de León and Lassaga promised to raise two million pesos in capital on the security of this guaranteed income, mainly from church organizations and rich private individuals.

Gamboa argued the 1584 Ordinances still provided the best foundation for the industry; Velázquez de León and Lassaga proposed to scrap the old law and draft a new mining code. The old law, in their opinion, was obscure, out-dated, and oppressive. It put miners at the mercy of lawyers and judges, who did not understand the complexities of the industry. They dismissed Gamboa's *Comentarios* as futile:

A few years ago here we received a Commentary, erudite and extensive, of our Ordinances. But the author was unable to supply what was missing in them, or erase what was superfluous, or enter into that high realm of interpretation reserved to the legislator. Beyond this, in doubtful, mistaken, or uncertain cases,

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<sup>474</sup> Juan Lucas de Lassaga and Joaquin Velázquez de León, *Representación que a nombre de la Minería de esta Nueva España, hacen al Rey Nuestro Señor* (México, 1774).

<sup>475</sup> In 1733 the crown doubled the seignorage fee to cover temporary military expenses but failed to lower it after the emergency passed. It was this half that the Tribunal sought.

the opinions of a commentator are just private doctrines that leave everyone the freedom to state an opinion.<sup>476</sup>

Velázquez de León took it upon himself to write a new code that would be clear, rational and simple to administer. It was designed to free miners from their dependence on expensive lawyers. In fact, the intention was to exclude both lawyers and ordinary civil judges from all dispute resolution concerning the mines.

Velázquez de León was a lawyer himself. Yet he placed great emphasis on the importance of mining expertise. He wrote with Lassaga in the 1774 Representation that:

The science of mining is too vast, obscure and complicated to be able to acquire easily. It demands an untiring study, experience, and thus a lifetime's dedication.<sup>477</sup>

For this reason, not only should lawyers be barred from mining litigation but merchants from mining finance. Velázquez de León and Lassaga claimed Gamboa's bank idea was fundamentally flawed. Merchants knew nothing about mining. They had never descended into the bowels of the earth. They would thus not know how to assess applications from miners for funding. Potential investors would shun a bank run by the consulado, they asserted. Gamboa, on the other hand, assumed that financial expertise, not an intimate knowledge of blasting and refining techniques, was the crucial factor in the success of a mining bank.

Miners were not alone in exalting their expertise and forming an organization in order to raise their social status. In the eighteenth century lawyers, painters and bakers all sought to establish professional associations. Gamboa himself helped the lawyers of Mexico City to organize the Colegio de Abogados.<sup>478</sup> New Spain's painters lobbied, albeit unsuccessfully, to create an academy to protect their status as noble practitioners of

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<sup>476</sup> Lassaga and Velázquez de León, *Representación de 1774*.

<sup>477</sup> Ibid.

<sup>478</sup> AGI, Mexico, 1702, "Gamboa to crown, s/f, 1760."

a liberal art.<sup>479</sup> Even the bakers of Mexico City, with the help of Gálvez, tried to form a guild to control the bread market.<sup>480</sup>

The Caroline government displayed a somewhat schizophrenic attitude towards privileged corporations. On the one hand, Campomanes and other economic reformers railed against guilds, especially the merchants' guilds of Cadiz, Mexico City and Lima that conducted Spanish transatlantic trade. They believed that by restricting market freedom and carving up jurisdiction, associations of merchants or laborers impeded economic development. Yet more politically attuned ministers, such as Gálvez, realized the usefulness of certain organizations to advance regalism. He promoted a number of bodies in New Spain that enjoyed exemptions from the ordinary courts, from the *Acordada* to the tobacco monopoly to even a crown office in charge of playing cards.<sup>481</sup> These agencies both undermined the jurisdiction of older institutions, notably the Audiencia, and could be more easily controlled by the crown. The proposed Mining Tribunal would act as a particularly sharp wedge into the jurisdiction of the Audiencia, depriving the court of cognizance over lawsuits arising from New Spain's most important industry. By uniting the miners into a single corporation, it would also make it easier for the crown to tap their resources. Like the merchants' consulado, the Tribunal could operate as a clearinghouse for loans to the government.

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<sup>479</sup> Susan Deans-Smith, "'This Noble and Ilustrious Art': Painters and the Politics of Guild Reform in Early Modern Mexico City, 1674-1768," in *Mexican Soundings: Essays in Honour of David A. Brading*, ed. Susan Deans-Smith and Eric Van Young (London, 2007).

<sup>480</sup> "Opinion of the Council of the Indies, March 2, 1773."

<sup>481</sup> On the tobacco monopoly see Susan Deans-Smith, *Bureaucrats, Planters, and Workers: The Making of the Tobacco Monopoly in Bourbon Mexico* (Austin, 1992).

## Bourbon officials versus the Bourbon Reforms

Opposition to the Mining Tribunal was intense. It came from experienced officials, established miners and merchants. It did not, however, trigger creole-peninsular antagonisms. Rather the fault line lay between those who accepted the customs, practices and institutions that had evolved in Spanish America and those who saw mainly abuse and decadence in the American system. Many Spanish-born officials, Bucareli and Tomás Ortiz de Landázuri prominent amongst them, rejected Gálvez's draconian solutions. They deployed their local knowledge and experience to question the practicality of the Mining Tribunal. They allied with creoles like Gamboa or *radicados* like Domingo Valcárcel. It looked in 1774 and 1775 that this alliance of experienced conservatives would easily defeat the Tribunal concept pitched by Velázquez de León and Lassaga and backed by Gálvez.

Gamboa and Valcárcel led opposition in New Spain.<sup>482</sup> Gamboa described his colleague on the bench in the *Comentarios* as "a subject of great wisdom, literature and known experience in these matters."<sup>483</sup> Valcárcel wrote the first serious critique of the Tribunal in August 1774, elaborating the points Gamboa made in an acuerdo meeting and citing the *Comentarios* with approval on many points. Gamboa had returned to Mexico City in April 1773, after three years of exile in Spain because of his opposition to the visita.<sup>484</sup> Indicative of the more conciliatory mood of the early 1770s, the crown not only allowed him to return to New Spain but promoted him in early 1774 to the civil division

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<sup>482</sup> Sanciñena Asurmendi, *Audiencia en México*, 38. Valcárcel (1700-1783), a native of Granada, served on the Audiencia of Mexico from 1728 to his retirement in 1778. His knowledge of mining came from his directorship of the mercury monopoly in new Spain from 1761 to 1783. Burkholder and Chandler, *Biographical Dictionary of Audiencia Members*, 339-340.

<sup>483</sup> Gamboa, *Comentarios*, 196.

<sup>484</sup> AGI, Mexico, 2778, "Opinion of Special Council, April 7, 1772." The crown attorneys of the Council of Castile, Campomanes and José Moñino, serving in the special committee that took cognizance of the post-Jesuit uproar in New Spain, cleared him of the political charges alleged by Croix and approved his return to New Spain.

of the Audiencia.<sup>485</sup> He was in place, therefore, to participate in the debate over mining reform.

Not surprisingly, the main criticism that Gamboa in the *acuerdo* and Valcárcel in his official submission to the crown leveled at the Tribunal was its exemption from the ordinary system of justice.<sup>486</sup> They argued that stripping the Audiencia of authority over mining lawsuits would harm, above all, the miners themselves. At the local level, they would be subject to the elected deputies of the Tribunal, fellow miners without legal knowledge and, not infrequently, with some material interest in the dispute at hand. No matter how uneven the administration of justice by *alcaldes mayores*, at least they were barred from owning local mines and thus free of the gross conflicts of interests inherent in the Tribunal's plan. To compound the prejudice to miners, they would lose the right to appeal to the Audiencias of Guadalajara and Mexico. Gamboa had written in 1761, in anticipation of the Tribunal's threat to the authority of the Audiencia, that "were the right of appeal to the Audiencias taken away, the remedy for injustice would be cut off, and the parties would be robbed of a natural right of defense."<sup>487</sup> Valcárcel claimed:

Only one ignorant of what is the Royal Audiencia and its mode of government and operation could proffer propositions so contrary to those expressed by the Author of the *Comentarios*, a subject who defended in the Royal Audiencia of Mexico many arduous and intricate cases of Mining law.<sup>488</sup>

Miners would in effect sacrifice legal protections in the name of self-government. Valcárcel called the judicial plan "so unlawful and confused that it could only be enforced with a total upheaval of the Laws."<sup>489</sup>

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<sup>485</sup> Simancas, Dirección General del Tesoro, 24-185-119, "Appointment as oidor, March 15, 1774."

<sup>486</sup> Although only Valcárcel signed the representation, perhaps to conceal Gamboa's involvement, it clearly embodied Gamboa's thinking. It encompassed the points Gamboa had made in an earlier meeting of the audiencia. AGI, Mexico, 2240, "Minutes of Real Acuerdo, Aug. 14, 1774."; AGI, Mexico, 2240, "Opinion of Valcarcel against the Mining Tribunal, Aug. 29, 1774."

<sup>487</sup> Gamboa, *Comentarios*, 467.

<sup>488</sup> "Opinion of Valcarcel against the Mining Tribunal, Aug. 29, 1774."

<sup>489</sup> *Ibid.*

The two oidores were equally critical of the Tribunal's mining bank. Just like the rejected proposal by the Italian miner Domingo Reborato in 1742, Velázquez de León and Lassaga provided for no oversight of their management of the bank's funds. They wanted to appoint themselves as directors for life without accountability. It was clearly an invitation for abuse and mismanagement. Throughout the *Comentarios*, Gamboa had scorned the lack of financial discipline of the miners, contrasting them to the prudent merchants of the consulado:

The first enemy of the miner is the miner himself. They are usually prodigal, without mode or end to their spending on luxuries, extravagances, and even vices. The peons and mine workers drink, gamble and spend whatever they earn: uncovetous men, they live for the day. They dress in fine fabrics, and even capriciously in fancy linen, but the following morning they descend into the mines...If these are the servants, imagine the masters!<sup>490</sup>

According to Gamboa and Valcárcel, the reputation alone of miners as extravagant spendthrifts – deserved or not – would stop outsiders from buying shares in a bank controlled by the Mining Tribunal. To give it complete authority over seignorage funds, part of the public patrimony, was a recipe for disaster.

At first glance, Gamboa's opposition to the technical college proposed by Velázquez de León and Lassaga looks odd. He was a strong advocate for education, helping to establish the Basque school for girls and saving in the 1770s a pair of ex-Jesuit schools for indigenous students.<sup>491</sup> His Basque friends in New Spain, especially Meave, raised funds through the Real Sociedad Bascongada de los Amigos del País for the fledgling technical college of Vergara in Spain.<sup>492</sup> Finally, in the *Comentarios* he stressed

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<sup>490</sup> Gamboa, *Comentarios*, 378. The original: "El primer enemigo de el Minero, es el Minero mismo. Suelen ser prodigos, sin modo, ni fin en gastos, luxos, superfluidades, y aun vicios. Los Peones, y Operarios beben, juegan, y gastan quanto ganan: hombres sin codicia, y hombres de el día. Vistense de tela rica, y de fino cambray por humorada: y al siguiente dia baxan a la Mina, donde les suele servir la gala para taco, y facilitar el golpe de el pico. Estos son los Sirvientes; como serán algunos Amos?"

<sup>491</sup> Luque Alcaide, "Francisco Javier Gamboa y la educación del indígena en México (siglo XVIII)."

<sup>492</sup> "Elogio póstumo de Don Ambrosio de Meabe," 436-443.

the need to develop a body of official mining experts in New Spain, to assist miners in designing shafts and tunnels, drafting charts, maintaining safety standards for workers, and assessing the quality of ore bodies.<sup>493</sup> Gamboa thought these technical advisors could study mathematics and related subjects at the University of Mexico. A specialized mining college, therefore, was an extravagance that would only impose additional costs on miners. Valcárcel figured that all of the technical information miners needed could be found in the pages of the *Comentarios*.<sup>494</sup>

At the end, Gamboa and Valcárcel believed that the Tribunal was too impractical to succeed. The adjudicative system would hurt miners, the bank would invite mismanagement, and the technical school would duplicate what the university could do at less cost. Miners themselves showed no aptitude for collective action. They lived far from Mexico City, unlike the merchants whose presence in the capital facilitated the management of the consulado. They also knew no economy, unlike the merchants who managed their wealth carefully and earned the public's trust in carrying out important projects such as the Mexico City drainage canal. The government should help miners but the best way to do so was to lower their costs and let them devote more time to their profession. Erecting a Mining Tribunal would be a costly and counterproductive excess.

The opinion of Gamboa and Valcárcel carried weight among top Caroline officials. Bucareli had already demonstrated his hostility to the innovations promoted by Gálvez, such as the intendancy system and the abolition of partidos. The Mining Tribunal seemed to embody the same disregard for local realities. In an opinion allegedly dictated by Gamboa himself according to Lassaga, the viceroy ruled the Tribunal contrary to the public interest. He backed Gamboa's plan to allow the consulado to take charge of a

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<sup>493</sup> Gamboa, *Comentarios*, 236.

<sup>494</sup> "Opinion of Valcarcel against the Mining Tribunal, Aug. 29, 1774."



mining bank.<sup>495</sup> The Council of the Indies also accepted Gamboa's reasoning *in toto*. Did it make sense, the Council asked, to "create a guild for subjects so dispersed and scattered in the vast extension of the whole kingdom and who are judged essentially unsocial, or if it would be more opportune that the merchants of the Consulado, who generally finance mining and the rehabilitation of old mines," be put in charge of a bank?<sup>496</sup>

The government minister in Madrid most familiar with New Spain, especially its mining industry, was Tomás Ortiz de Landázuri. A Basque from Álava, born in 1722, he started his public career in New Spain in the early 1740s as an aide-de-camp to the viceroy, the conde de Fuenclara. He served from 1747 to 1749 as the corregidor of Zacatecas, the northern bastion of the mining industry, where he adjudicated mining disputes. He participated in the establishment of the Bolaños camp and spent time in Mexico City in the early 1750s. His last stop in New Spain was Gamboa's hometown of Guadalajara, where in 1756 he served as *alcalde ordinario*, or municipal judge, and later a *regidor*, or alderman.<sup>497</sup> He married a native of that city, Josefa de Sierra. He returned to Spain in the early 1760s, invited to participate in the committee considering the rules of transatlantic trade. He may have written the report recommending liberalizing trade between Spanish and Caribbean ports.<sup>498</sup> At the beginning of 1765, the crown named him *contador-general*, or chief accountant, of the Council of the Indies. This position gave him the opportunity to review most business transacted by the Council. He served until his death in 1777.<sup>499</sup>

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<sup>495</sup> AGI, Mexico, 2240, "Lassaga to Gálvez, June 27, 1778." Howe, *Mining Guild of New Spain*, 49.

<sup>496</sup> AGI, Mexico, 2240, "Dictamen of Council of the Indies, April 23, 1776."

<sup>497</sup> AGI, Indiferente General, 158, "Relación de méritos, 1757."

<sup>498</sup> Stein and Stein, *Apogee of Empire*, 69-79.

<sup>499</sup> Gildas Bernard, *Le Secrétariat d'État et le Conseil espagnol des Indes, 1700-1808* (Genève, 1972), 126-132; Burkholder, *Councillors of the Indies*, 88-89; Stein and Stein, *Apogee of Empire*, 79, 153, 168.

Landázuri and Gamboa had much in common. They were both deeply immersed in the transatlantic Basque community and both enthusiastic promoters of Guadalajara. In 1766, Landázuri served as rector of the Congregación de San Ignacio, the principal Basque confraternity in Madrid, officially affiliated with Gamboa's confraternity of Nuestra Señora de Aránzazu in Mexico City.<sup>500</sup> He also joined the confraternity of the Virgin of Guadalupe in Madrid, where he could carry out his devotion to the novohispano icon while helping *americanos* negotiate their way at the royal court.<sup>501</sup> Landázuri and Gamboa may have met in Mexico City in the early 1750s. They definitely were acquainted in Madrid in the early 1760s. Gamboa wrote a brief scientific treatise on pearls for Landázuri in 1761, in order to publicize the pearl fishery of the Gulf of California, of interest to the merchants of Guadalajara.<sup>502</sup> They both supported the idea of establishing New Spain's second mint in Guadalajara and in Madrid Landázuri lobbied for the creation of a university there.<sup>503</sup>

It was not just the Basque and Guadalajara connections that brought Landázuri and Gamboa together. The two men shared a similar view of law and government. Landázuri was steeped in the old legality of the Indies, from its casuistic focus on local conditions to the broad jurisdiction of the Audiencias.<sup>504</sup> Unquestionably a staunch Spanish colonialist, he nevertheless believed that royal law had to bend to American

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<sup>500</sup> Angulo Morales, "San Ignacio de Loyola," 29.

<sup>501</sup> Mariluz Urquijo, "Indiano en la corte."

<sup>502</sup> BRP, MS Ayala, 2834, "Breve Noticia del origen y formación de las Perlas; Parajes en que se crían; modo con que se pescan, quilatan, y valúan; y de las mas particulares y raras que se han visto, especialmente las que de las Costas del Mar Californio condujo a España D. Thomas Ortiz de Landazuri," 1761.

<sup>503</sup> Juan López-Hidalgo Preciado, "Fundación de la Real Universidad de Guadalajara," *Podium* (June 2003): 62.

<sup>504</sup> Priestley, in his study of the visita of Gálvez, paints Landázuri as the chief conservative opponent in the Council of the Indies of the visitor-general. See Priestley, *Gálvez*, 181-183; 209.

conditions in order to remain effective and legitimate.<sup>505</sup> He articulated his thinking in an opinion on a March 18, 1767 edict by Croix, supported by Gálvez, prohibiting all traffic in unregistered silver:

It frequently occurs that a general provision, sound and just in its origin, is not appropriate for certain provinces and countries, for the diversity of uses and practices in their economy and in the arrangement of things that necessity introduced and authorizes. This obliges a tempering of things in prudent proportion to the constitution, state and nature of such places. In this way, what in some places is opportune, useful and proper, in others is impractical, prejudicial and ruinous, as happens every day with new measures that do not proceed from a mature examination and consultation with wise and expert people who know through experience the quality and situation of the countries and their inhabitants.<sup>506</sup>

In the case at hand, Landázuri argued there was no alternative to the use of raw silver as money in northern mining districts.<sup>507</sup> Tolerating this practice kept the mines afloat and did not necessarily deprive the crown of royalties. The silver eventually wound up in treasury offices. Issuing a decree against it would accomplish nothing except invite disrespect for the law. A mint in Guadalajara, which could supply northern New Spain with the legal tender it lacked, was the best way to rectify the problem.

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<sup>505</sup> About the only place Gamboa and Landázuri disagreed was on the question of mercury mining in New Spain. As contador-general of the Council of the Indies, Landázuri thought that the monopoly of Almadén should be maintained in order to stimulate transatlantic communication and keep New Spain's economy linked to the mother country. AGI, Mexico, 1266, "Opinion by contador-general, July 13, 1767." He said: "...dictan la prudencia, y la politica, que mientras haya en el Almaden abundancia de este ingrediente, se provea desde aca, para mantener la dependencia de aquellos dominios a su Cabeza; fomentar la Navegación con esta materia y conservar en corriente una finca tan preciosa, e importante como la mina del Almaden.."

<sup>506</sup> AGI, Mexico, 1266, "Opinion of Landázuri on unregistered silver shipments, July 20, 1767." The original: "Frequentemente acahece, que una providencia general, sana, y justa en su fondo, no es acomodada a ciertas Provincias y Payses, por que la diversidad de usos, y modos en su giro, y en el manejo de las producciones que introdujo y autoriza la necesidad, obligan a atemperar las cosas con prudente proporcion a la constitucion, estado, y naturaleza de los parajes; de manera que lo que en unas partes es oportuno, util, y arreglado, en otras es impracticable, perjudicial, y ruinoso, como se toca cada dia en las disposiciones nuevas a que no precede un maduro examen, y en que no se consulta el juicio, y dictamen de gentes practicas, que conocen por experiencia la calidad, y situacion de los Payses y sus avitadores."

<sup>507</sup> Gamboa, *Comentarios*, 419.

Landázuri's coolness towards the proposed Mining Tribunal came from his own experience as a mining judge. He appreciated the Audiencias' role in adjudicating mining lawsuits. In a survey of the mining districts of New Spain he composed in 1764, Landázuri condemned the continual interference by viceroys in the court's jurisdiction. He was especially severe towards Revillagigedo's intervention at Bolaños, which he knew first-hand:

If promptly the remedy of these evils is not applied, enforcing what had lately been ordered by His Majesty and the Supreme Council of the Indies, that cognizance over all lawsuits at Bolaños be restored to the President and Audiencia of Guadalajara...that mining camp will be entirely depopulated and the well-founded hopes for new discoveries in the same mountains will be frustrated.<sup>508</sup>

To restore mining to prosperity, all that was necessary, Landázuri wrote in 1764, was sufficient mercury and the enforcement of the existing laws. In 1767 he enthusiastically signed off on the representation by Velázquez de León and company on mercury prices.<sup>509</sup> In approving the second round of price cuts for mercury in 1776, he said that reducing the financial burden on miners, through lowering mercury prices and royalty charges, was "the most just, natural and gentle way of all those imaginable to encourage that *importantísimo* body of vassals and to increase the royal treasury."<sup>510</sup> He saw no need for the radical change embodied by the Mining Tribunal.

With the viceroy of New Spain, the Audiencia of Mexico, the Council of the Indies and its influential contador-general against it, how did the crown come to approve the Mining Tribunal on July 1, 1776? The answer appears to be the enormous power Gálvez had acquired over the machinery of government. Upon his return from New Spain

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<sup>508</sup> "Noticias de los Minerales...".

<sup>509</sup> AGI, Mexico, 1266, "Opinion of Landázuri on mercury prices, July 20, 1767."

<sup>510</sup> "Opinion of Landázuri on mercury prices, Feb. 9, 1776." The original: "...proponiendo mi dictamen a el beneficio y fomento de los mineros en la baja de azogues y Derechos como unico medio de alentar aquel importanissimo Cuerpo de Vasallos, y engrosar la Real Hacienda por el modo mas justo, natural y suave de quantos se pueden imaginar."

in 1772, he assumed his place on the Council of the Indies and was promoted to the *cámara*, the governing chamber, on July 7, 1772. With the death of Julián de Arriaga, Charles III chose Gálvez as his new secretary of state for the Indies on February 19, 1776.<sup>511</sup> Gálvez then added the governorship of the Council of the Indies on March 31, 1776, the first time a single minister held the two principal offices for overseas policy.<sup>512</sup> He could thus neutralize the usual resistance from the Council to any plans coming out of the secretariat. He was ready to restart the engines of Caroline reform. Over the next decade, Gálvez pushed through an enormous agenda of structural change for America, including the creation of the new viceroyalty of Rio de la Plata, the suppression of the Cadiz trade monopoly, the extension of intendancies, and *visitas* to Peru and Nueva Granada. At the top of his list for New Spain was the establishment of the Mining Tribunal. He was ready to apply to all of the Indies the governing approach he had honed in New Spain during the *visita*, underwritten by a form of legality that held the king's law inviolable.

If Gamboa had been relatively discreet in criticizing the proposed Tribunal before 1776, allowing Valcárcel to take the lead, he declared war in April 1778. His main objective was to thwart the transfer of jurisdiction over mining cases from the Audiencia to the Tribunal. Nothing would happen until the promulgation of the new law code, which Velázquez de León was still drafting in the spring of 1778.<sup>513</sup> According to the Audiencia judge Balthazar Ladrón de Guevara, all the new director-general of the Tribunal had to do, was follow "the light of the erudite and learned commentary, the only one on the subject, by Señor Don Francisco Gamboa."<sup>514</sup> Considering the amount of time

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<sup>511</sup> Priestley, *Gálvez*, 7; Stein and Stein, *Apogee of Empire*, 155.

<sup>512</sup> Burkholder, *Councillors of the Indies*, 45.

<sup>513</sup> AGI, Mexico, 2240, "Tribunal to Gálvez, May 26, 1778."

<sup>514</sup> AGI, Mexico, 2240, "Ladron de Guevara's opinion, June 21, 1777."

that Madrid generally devoted to revising and editing new legislation, the opponents of the Tribunal believed they could still save the Audiencia's authority over the industry.

Gamboa found an ideal case to discredit the directors of the fledgling Tribunal. Tomás de Liceaga, the new Tribunal's deputy in Guanajuato and a member of its board of directors, along with his mining partner Vicente Maldonado, sought to retain title on an abandoned mine by arguing that the *buscones*, or scavengers, who were pillaging the mine, qualified as workers under their employ. The *alcalde mayor* in Guanajuato accepted this argument, denying the registration of the new claimant, José Muñoz Castelblanque. The Audiencia overturned this decision on appeal, which occasioned Gamboa's withering report to the Council of the Indies.

Gamboa had devoted a chapter in the *Comentarios* to the obligation of mine owners, under Ordinance 37, to keep at least four workers employed continuously in order to retain valid title.<sup>515</sup> The whole point of the law, Gamboa explained, was to prevent *buscones* from invading viable properties. Gamboa asked sarcastically, "If the first Deputy of the most famous and opulent mining district in the kingdom approves as legal and consistent with the Ordinances the fraud of claiming scavengers as proper workers," what hope could there be for the administration of justice under the Tribunal?<sup>516</sup> He then attacked the leadership of the new Tribunal personally. Its two senior officers, Velázquez de León and Lassaga, were self-appointed and not even miners.<sup>517</sup> Of the board members, only Liceaga and Marcelo de Anza were active miners, although Anza, according to Gamboa, was so infirm he could not sign his own name. The Tribunal had agreed to pay Liceaga the extraordinary salary of thirteen thousand pesos annually, more than what the regent of the Audiencia earned. The mining industry of

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<sup>515</sup> Gamboa, *Comentarios*, Chapter XVII, 323-340.

<sup>516</sup> AGI, Mexico, 2240, "Audiencia Representation to crown, April 26, 1778".

<sup>517</sup> See on directors of the board, Howe, *Mining Guild of New Spain*, 53-57.

New Spain would be ruined, Gamboa predicted, if “illiterates, without judgment, discretion, or experience” were put in charge of the mining laws. He asked the crown to stop the transfer of jurisdiction for “the extremely grave difficulties that would result not just in the opulent mining district of Guanajuato but in all the rest if jurisdiction were conceded over mining cases to the Administrator-general, Director, and Deputies.”<sup>518</sup>

Gamboa’s caustic charges against the new directors of the Tribunal put him back in the cross hairs of Gálvez. As an *alcalde del crimen*, Gamboa had spoken out against Gálvez and the *visita*, leading to his removal from New Spain in 1769. Less than a decade later, he was at it again, trying to hold back reforms championed by Gálvez he considered unnecessary, ill advised, and dangerous. In case Gálvez was not already apprised of the situation, Lassaga warned him of the threat Gamboa posed to their plans:

In spite of the well-known protection that the mining profession owes Your Excellency, a few judges of the Audiencia attack us through various means. In the last post, they sent a representation to the Council, promoted and redacted by the *oidor* Don Francisco Xavier de Gamboa (signed as well by Señor Don Domingo Valcárcel, who in these matters will never be retired)... They add nothing new this time, but if Your Excellency does not see fit to show them your displeasure, they will continue in their conduct and even thwart whatever provisions Your Excellency may take to benefit this body.”<sup>519</sup>

Gálvez also received news about Gamboa from Pedro Antonio de Cossío, a veteran of the *visita* installed as the head of the viceregal secretariat under Bucareli’s successor, Martín de Mayorga. Cossío claimed Gamboa was using his unrivaled knowledge of the government of New Spain to hold up various measures supported by Gálvez.<sup>520</sup> For

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<sup>518</sup> "Audiencia Representation to crown, April 26, 1778 ".

<sup>519</sup> "Lassaga to Gálvez, June 27, 1778." Valcárcel had officially retired from the Audiencia as the *oidor decano* on February 19, 1778 although he remained the administrator of the mercury monopoly until his death in 1783.

<sup>520</sup> Cossío, a former treasury official in Veracruz, was placed by Gálvez in the viceroy’s office after the death of Bucareli. Gálvez planned to install his brother Matías as viceroy, but the unexpected death of Bucareli, before the new appointment could be finalized, resulted in the automatic elevation of Bucareli’s designated successor, Mayorga, the Captain-General of Guatemala. Matías de Gálvez followed Mayorga in 1783. Cossío was a disastrous administrator, alienating everyone he crossed paths with, but at least kept

instance, Gamboa “carried the banner” for all those opposed to Gálvez’s plan to consolidate the cash accounts of the church and government in the Mexico City mint, which would give the crown ready access to capital in case of a crisis.<sup>521</sup> The truculent oidor, seasoned in bureaucratic battles, posed no small problem for the minister of the Indies.

At the end of 1780, Gálvez found a way to deal with Gamboa. He arranged the promotion of the oidor to the regency of the Audiencia of Santo Domingo, the oldest but least prestigious high court in America. Gamboa refused to go, claiming that at sixty-three he was “more ready for the tomb than voyages by sea and land.”<sup>522</sup> At his age the tropical climate of the Caribbean could kill him. He pleaded poverty, claiming he had exhausted his fortune the last time he had been forced to leave New Spain in 1769. All that remained was his famous library, “amassed over forty years at much expense and patience.”<sup>523</sup> His biggest concern was his family. His wife, María Manuela, and three of his four daughters were sick and unable to travel. If the crown no longer valued his services in New Spain, he requested permission to retire honorably.<sup>524</sup> For almost three years he rebuffed repeated crown orders to report to duty in Santo Domingo.<sup>525</sup>

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Gálvez well informed of developments in New Spain in a series of acidulous letters. For the correspondence, see AGI, Mexico, 1511. On Cossío see Brading, *Miners and Merchants*, 61-63.

<sup>521</sup> AGI, Mexico 1511, “Cossío to Gálvez, Nov. 20, 1780.” Brading attributes Gálvez’s decision to boot Gamboa from New Spain a second time mainly to Gamboa’s obstructions to the measures Cossío tried to implement. Brading, *Miners and Merchants*, 69-70.

<sup>522</sup> AGI, Mexico, 1876, “Representation to the king, March 14, 1781.” This submission, with eleven supporting documents, reviewed his entire career as an audiencia minister, to demonstrate his constant dedication and service to the king.

<sup>523</sup> Ibid. He claimed that his exile to Spain from 1769 to 1773 had cost him more than 50,000 pesos. As for his library, he claimed to have sold it off in 1769 to finance his first trip.

<sup>524</sup> Both the viceroy Mayorga and Cossío wrote to Gálvez saying it would be more just to allow Gamboa to retire than to send him to Santo Domingo. AGI, Mexico, 1511, “Cossío to Gálvez, March 14, 1781.” AGI, Mexico, 1876, “Mayorga to Gálvez, March 16, 1781.”

<sup>525</sup> The first order came on December 19, 1780, followed by others on October 12, 1781, May 24, 1782, and March 20, 1783.



Gálvez was finally forced to make a concession to the family to dislodge Gamboa from New Spain. He found a position for Gamboa's son, Juan José, back in Mexico City in the cathedral chapter. Juan José returned home in May 1783, after thirteen years in Spain, where he had lived since accompanying his father at the end of 1769. Upon arrival, he reported to Gálvez:

My Father old, annihilated, almost dead, my Mother and my sisters finished, suffering from such constant afflictions that I do not know how they survive. This was the sight my household presented to me and I thus see its irremisable destruction if the mercy of our lordship the king is not disposed to exonerate my father from the Regency of Santo Domingo.<sup>526</sup>

With Juan José able to look after the family and all avenues of recourse exhausted, Gamboa finally acceded to the order. He set off for Santo Domingo in October 1783, passing through Havana on the outbound voyage.

### **Failure of the Tribunal?**

In the years Gamboa presided as regent of the Audiencia of Santo Domingo, from 1783 to 1788, the Mining Tribunal collapsed, as he predicted. With no governmental oversight, Velázquez de León and Lassaga grossly mismanaged the organization's finances, seeming to confirm the reputation of miners as irresponsible spendthrifts.<sup>527</sup> Out of the income from seignorage, the directors paid themselves lavish salaries, organized celebratory bullfights, minted commemorative medals, and leased costly offices.<sup>528</sup> To honor their benefactor, they awarded Gálvez and his heirs a four thousand peso annual

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<sup>526</sup> AGI, Mexico, 1876, "Juan José Gamboa to Gálvez, May 30, 1783."

<sup>527</sup> Howe, whose study on the Tribunal remains the most thorough, remarked: "It was a commonplace in Mexico, recognized by Lassaga and Velásquez de León prior to their assumption of authority, that miners were an improvident lot who soon dissipated the wealth that came to them in times of bonanza. When they found themselves with large funds at their disposal, the members of the Tribunal proved to be no better or wiser than their fellows in this regard." Howe, *Mining Guild of New Spain*, 155.

<sup>528</sup> AGI, Mexico, 2240, "Royal Order for Reorganization, Aug, 19, 1786."

pension in perpetuity.<sup>529</sup> Worse, they bankrupted the Tribunal's bank. According to Ramón de Posada, New Spain's crown attorney for fiscal matters, they lost eight hundred thousand pesos on loans to miners.<sup>530</sup> The board exercised no due diligence and channeled funds to their acquaintances and well-connected but inexperienced miners. According to the calculations of historian Walter Howe, the crown gave up 1.5 million pesos in seignorage fees during the first decade of the Tribunal's existence and only recouped about fifty thousand pesos in increased royalties.<sup>531</sup> Pedro María de Monterde, the first independent auditor to examine the Tribunal's books, remarked about Velázquez de León, "This one seemed to work with greater effort to ruin mining than to establish and adorn its Tribunal."<sup>532</sup> All of this came to light in 1786, when Velázquez de León and Lassaga died within a month of each other and the viceroy, Bernardo de Gálvez, the nephew of José and son of the previous viceroy, Matías de Gálvez, launched an inquiry.<sup>533</sup>

The chief business of the Tribunal turned out to be lending to the crown, not to miners. Its secure income from seignorage allowed it to underwrite large loans. Even before the first general meeting on May 4, 1777, Velázquez de León and Lassaga signed off on a three hundred thousand peso loan to the government to fund a naval shipyard in Coatzacoalcos. In 1782, they backed a massive one million peso loan to the crown, to help defray war expenses.<sup>534</sup> On neither occasion did they seek the approval of the local

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<sup>529</sup> AGI, Mexico, 2235, "Royal decree, July 21, 1779."

<sup>530</sup> AGI, Mexico, 2238, "Posada to Valdés, Dec. 30, 1788." Brading described Posada as "the most enlightened and honest of New Spain's public servants." Posada later served on the Council of the Indies after his return to Spain. Brading, *Miners and Merchants*, 117.

<sup>531</sup> Howe, *Mining Guild of New Spain*, 150-152.

<sup>532</sup> AGI, Mexico, 2240, "Letter regarding Tribunal's accounts, Aug. 12, 1786."

<sup>533</sup> AGI, Mexico, 2240, "Bernardo de Gálvez to Gálvez, March 28, 1786."; AGI, Mexico, 2240, "Crown to Bernardo de Gálvez, Sept. 16, 1786." Gálvez's attempt to turn New Spain into a family-run concern failed when first his brother, then his nephew died prematurely in office.

<sup>534</sup> This loan provoked the first organized protest of the Tribunal, by miners who had benefited from concessions from the crown for rehabilitation projects and thus had little need for the Tribunal. These

deputies. These loans to the crown greatly exceeded what the Tribunal invested in mining. In fact, the Tribunal had to impose additional costs on the average miner, as fees at the mint had to rise to cover the Tribunal's spending. Fausto de Elhuyar, the Spanish scientist who succeeded Velázquez de León as director-general in 1786, serving until Mexican Independence, admitted in 1813 that the bank's income "has served rather as a recourse for the Government than as the fund which the miners hoped would be used for their benefit."<sup>535</sup> Instead of a syringe to inject capital into mining, the Tribunal's bank acted as a sponge to soak up cash from the miners.

Velázquez de León succeeded in drafting the new legal code for mining. It took until 1783, however, five years after he completed it, for Madrid to promulgate the statute. In the meantime, the Tribunal operated provisionally, with adjudication of disputes still in the hands of the *alcaldes mayores* and *Audiencias*. The new code was an improvement on the 1584 Ordinances, in that it removed what Gamboa had indicated in the *Comentarios* was obsolete or contradictory while retaining the spirit of the old law, which was to encourage private enterprise. Perhaps because Velázquez de León hewed so closely to Gamboa's analysis, the author of the *Comentarios* conceded that his fellow jurist deserved applause for his accomplishment.<sup>536</sup>

Yet the new code failed to simplify or speed up the adjudication of mining disputes. Despite the belief that a rational law code would allow miners to represent

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miners included the heirs to the Borda and Fagoaga mining concerns, Miguel Pacheco Solís, Juan Francisco Echarri, and Juan de Sierra Uruñuela, who may have been related to Landázuri's wife. See AGI, Mexico, 2241, "Representation by miners, Aug. 7, 1782."

<sup>535</sup> Quoted in Howe, *Mining Guild of New Spain*, 383.

<sup>536</sup> In his 1790 opinion on the future of the Tribunal, Gamboa was surprisingly magnanimous towards the achievement of Velázquez de León: "...en mover a los principales minerales, a reunirse, para que la Minería se formase en cuerpo, hacer unos Informes bien fundados, y de tal eficacia que movieron a SM a concederlo, y a calificarlo por un cuerpo Importante, a formar las Ordenanzas que igualmente merecieron a Real Calificación impendiendo en todo esto el referido tiempo, y tantas fatigas consecuentes, y precisas por el beneficio que se concibió resultaría a toda la Minería. Y aunque el tiempo ha dado el desengaño, esto no quita un apise del merito, y afanes recomendables de dicho señor ministro..." "Opinion of Gamboa on Mining Tribunal, January 1, 1790."

themselves, they continued to employ lawyers surreptitiously. Gamboa pointed out the danger of this in his 1790 opinion on the future of the Tribunal: lawyers unknown to the adjudicator could act irresponsibly and even fraudulently, complicating lawsuits and jeopardizing justice.<sup>537</sup> Miners also continued to face judges, including Audiencia oidores, as Madrid heeded the warnings of Gamboa and others of the dangers of entrusting the entire apparatus of justice to miners. In 1785, when the new system finally went into operation, local deputies heard cases at first instance, as originally proposed in the 1774 Representation, but regional panels consisting of two miners and an experienced civil judge heard appeals. For the Guadalajara and Mexico City regions, these judges were Audiencia magistrates. In 1793, because of the incompetence of most of the local deputies in legal matters, the crown brought civil officials back at the trial level and centralized appeals in Guadalajara and Mexico City.<sup>538</sup> Nothing much had changed for mining litigants despite all the effort expended trying to revamp the system. The dream of a rational system of law that would do away with lawyers and judges hit the rocks of reality.

## Conclusion

The long history of mining reform in New Spain under Charles III, beginning with the publication in 1761 of Gamboa's *Comentarios* and culminating with the collapse of the Mining Tribunal in the late 1780s, illustrates many of the salient features of the overall Caroline reform process. Gálvez pushed through an ambitious institutional reform, designed more to improve the crown's ability to tap New Spain's silver wealth

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<sup>537</sup> Ibid.

<sup>538</sup> Fausto de Elhuyar, the director-general of the Tribunal from 1786 to 1812, had little faith in the local deputies and supported greater centralization of Tribunal functions. Howe, *Mining Guild of New Spain*, 190.

than to help the average miner. As far as the miners were concerned, the Tribunal, as Gamboa and Valcárcel predicted, simply imposed additional costs, perhaps offsetting entirely the benefit of cheaper mercury. From a regalist perspective, however, the Tribunal succeeded. By bringing together miners into a single organization, the crown established a new platform for raising loans in New Spain. The Tribunal also weakened the Audiencia, inasmuch as it deprived the court of jurisdiction over one of the most lucrative industries in New Spain. Yet the crown may have ultimately been better off following the less interventionist prescriptions of Gamboa and Landázuri. Lowering mercury prices and moderating taxes in accordance with the level of private investment might have been all that was necessary to increase the crown's revenues from silver production. If so, the Mining Tribunal was a costly and unnecessary distraction.

The return of Gamboa to New Spain in 1788 as the regent, or chief justice, of the Audiencia of Mexico was more than a happy conclusion to a long career; it also symbolized the resilience of the old legal order he embodied. The regalist promoters of a more streamlined legality, in which royal statutory law would be the sole source of enforceable rules and would bring greater uniformity to the Spanish empire, could never overcome the solidity of *Derecho Indiano*. The old legality had evolved slowly in response to both metropolitan imperatives and local conditions. Because of the variety of circumstances in America it faced, as well as the sediment of changing policy it inevitably reflected, it appeared an irrational mess to eighteenth-century legal reformers. Yet its very rootedness in American conditions made it difficult to reform and perilous to replace. Plenty of Spanish officials during the reign of Charles III understood this reality. When Gálvez died in 1787, the crown divided his old portfolio, appointing Antonio de

Porlier as the minister of the Indies in charge of matters of justice.<sup>539</sup> Married to a creole, with long experience in America in the judiciary, Porlier restored the older, more conciliatory mode of colonial government, glimpsed briefly in the tenure of Bucareli in the 1770s.<sup>540</sup> By selecting Gamboa, an old acquaintance, to represent the crown as the regent of the Audiencia, Porlier signaled in his way the continuing vitality of Derecho Indiano.<sup>541</sup>

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<sup>539</sup> The crown divided the secretariat of the Indies into two offices after Gálvez died, one for grace and justice and the other for military matters, held by Antonio de Valdés. On Porlier see Burkholder and Chandler, *Biographical Dictionary of Audiencia Members*, 266-267.

<sup>540</sup> See Tau Anzoátegui, *Casuismo y sistema*, 222-223. As late as 1801 Porlier still recommended the suppression of Gálvez's intendancy system in Spanish America. He praised the ancient system of government in the Indies as having guaranteed social peace and jurisdictional harmony.

<sup>541</sup> AGI, Mexico, 1642, "Gamboa to Porlier, Jan. 25, 1788."

## Conclusion

This dissertation began as an inquiry into the role Francisco Xavier Gamboa played in the period of the so-called Bourbon reforms. David Brading in his groundbreaking *Miners and Merchants in Bourbon Mexico*, published in 1971, painted Gamboa in the guise of a stalwart defender of the corporate interests of the merchants of Mexico City.<sup>542</sup> My initial objective was to test this characterization, which I suspected was overly reductive. Brading acknowledged Gamboa's legal brilliance, displayed in his *Comentarios a las Ordenanzas de Minas* and later in his bureaucratic manoeuvres to thwart elements of the reform program of José de Gálvez. It was the law that captured my imagination and which I believe offers a fresh perspective on a crucial hinge period in Spanish American and Atlantic world history.

Gamboa was the outstanding lawyer of his day, a successful courtroom advocate, a lucid analyst of the mining laws, and an influential Audiencia magistrate. Focusing on his career brings into sharp relief the vibrant and sophisticated legal culture of his era. It also illustrates how much the law mattered in Spanish government in the Indies. The law had substance. It bowed to power, both economic and political, but still had sufficient gravity to restrain the arbitrary exercise of power. It was not a mere façade or smokescreen obscuring the harsh facts of Spanish domination. This finding is consistent with recent studies of colonial law, notably Brian Owensby's *Empire of Law and Indian Justice in Colonial Mexico*.<sup>543</sup>

Spanish law in America worked in two ways to curb abuses of power. First, legal culture itself helped keep the law relevant and legitimate for colonial subjects. This

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<sup>542</sup> Brading, *Miners and Merchants*.

<sup>543</sup> Owensby, *Empire of Law*.

culture was shaped by a cohesive body of professionals, the graduates of the law faculties of Spanish and Spanish American universities. They were trained in Roman law, which gave them a strong historical perspective and a cosmopolitan world view. They defended the prestige of the law and insisted confidently that government action should conform to it. Even a radical reformer like Gálvez, a graduate of the law faculty of the University of Salamanca, knew to respect the limits imposed by law and custom, even those he personally opposed. He could not, for instance, simply dismiss a recalcitrant magistrate like Gamboa from his post; he had to respect the rules that protected the life tenure of Audiencia ministers.<sup>544</sup> At the same time, law became part of the everyday practice of the community in Spanish America. The frequency that ordinary people willingly participated in court proceedings attested to the legitimacy the law enjoyed in colonial society.

In a more concrete way, the law restrained power through the tradition of judicial autonomy. In America, the Audiencias saw themselves as representatives of the king as much as did the viceroys. In fact, the high courts embodied the most venerable quality of kingship, the provision of justice to the community. Working cooperatively with viceroys most of the time, the Audiencias exercised, when necessary, the right to protest and challenge viceregal decisions they considered unlawful or contrary to their own dignity and jurisdiction. The Spanish colonial system, therefore, despite not sharply separating judicial, legislative and executive functions, contained a built-in balance of powers, with strong courts authorized to check government officials. Montesquieu in *The Spirit of the Laws*, one of the formative political texts of the eighteenth century, recognized the

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<sup>544</sup> On the role of lawyers in supporting the rule of law see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, UK, 2004), 58-59.



balanced constitution as the secret of the moderation of monarchical regimes. Intermediate institutions, especially law courts, were essential to preserve liberty.<sup>545</sup>

The prominence of the law in eighteenth-century New Spain suggests that the weakness of the rule of law in contemporary Latin America cannot be directly attributed to the Spanish legal heritage. Scholars and commentators have tried to link the laxity in enforcing royal law in colonial Spanish America to the failure to abide by state law today. There are at least two problems with this argument. First, it fails to recognize that weak enforcement of royal law was a characteristic of all early modern legal systems. Before the formation in the nineteenth century of modern states, the law emanating from weak central authorities was always subject to negotiation with people on the ground. As Lauren Benton shows in *Law and Colonial Cultures*, even the British, the modern paragons of the rule of law, were unable to make royal law stick without taking into account the customs and sensibilities of subject populations.<sup>546</sup>

Spanish law in the eighteenth century had much in common with English law. It was pluralistic, in that it accepted common law, native custom, and equity as legitimate sources of law independent of royal statutes. It provided no written constitution with which to order government. It had proudly independent courts of law. It tolerated a high degree of jurisdictional politics. It may have enjoyed greater legitimacy than English law did among its subject populations in America, as the indigenous and slaves under Spanish domination turned to the law more than their counterparts did (or could) in British America. Looking for a colonial origin for the troubled administration of justice in Latin

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<sup>545</sup> Charles de Secondat Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone trans. (Cambridge, 1989), Book XI, *On the laws that form political liberty...*, 154-186. On Montesquieu's views on the rule of law see also Tamanaha, *On the Rule of Law*, 52-54. Although formally proscribed by the Inquisition, *The Spirit of the Laws* was widely read and discussed in the eighteenth-century Spanish world. See Sánchez-Blanco, *El Absolutismo y las Luces*, 24, 169-170.

<sup>546</sup> Benton, *Law and Colonial Cultures*, 132-140.

America today, therefore, fails to appreciate the achievement of Spanish law in America, and its relative success compared even to the English law of British North America. More comparative legal research would be welcome, especially using an Atlantic world perspective that would counter the tendency to see Spanish and English law as two opposite types.

The second problem in seeking a colonial origin for contemporary legal problems is equating the flexibility of colonial law with modern-day lawlessness. The classic example is the misinterpretation of the formula, *obedezco pero no cumplo*. This was not a cheeky way for authorities to shirk their duty by claiming to obey the king's law but then refusing to enforce it. Rather, it was a historic device in Spanish law that recognized that not all the laws issued by the king would be perfectly drawn for the conditions in the area where they were to apply. Without a strong representative component in Spanish government, *obedezco pero no cumplo* offered one way for regional officials to contribute to lawmaking. It was a feedback mechanism that kept the law responsive to local contingencies. This too calls for further research, as *obedezco pero no cumplo* remains a bit of a riddle. We do not fully know how often it was used or by whom.

In any event, royal law was just one of several sources of normative order. In colonial times the juridical penumbra was wider than today in countries like Mexico, where codified state law monopolizes the field. Behavior that contravened royal law in the eighteenth century could still be legally justified by common law, custom or equity; today, because of the state's capture of all legislative power, what is right and wrong in the legal sense is much more tightly circumscribed. The law today in Latin America has lost the flexibility it had in colonial times, due to the failure to maintain independent courts and establish stable representative institutions.

Yet if continuity between colonial and modern law in Latin America remains problematic, the origin for contemporary problems can still be traced to colonial times: the moment when the Caroline reformers began to attack the old colonial legal order in the interests of creating a more efficient apparatus of power. By insisting on the supremacy of royal law and curbing the power of the judiciary, the ministers of Charles III, particularly Gálvez, inadvertently set the stage for an increase in arbitrary and despotic power. The counsel of experienced lawyers was shunned and, on occasion, as with the proposed judicial system of the Mining Tribunal and the 1776 prohibition on commentaries on the Law of the Indies, expressly barred from consideration. The jurisdiction of the Audiencia suffered severe erosion. It lost sway over criminal justice to the Acordada, an agency staffed not by lawyers but soldiers and police officers, who ignored the procedural safeguards long established in Spanish law. It lost jurisdiction over mining, New Spain's most consequential industry.

In retrospect, it is apparent that the ministers of Charles III were attempting to centralize power, a prerequisite for the emergence of a modern state. Progress, however, was uneven, with saw-tooth movements forward and back, due in part to the gravitational pull the law could still exert. In the early 1770s and again in the late 1780s, the old balance in powers seemed to be restored. It was not really until after Independence, with the rise of republicanism and legal codification, that the Caroline assault on the old law and judicial autonomy was complete. Somewhere in that long process, which scholars still must identify, law lost much of the legitimacy it enjoyed in colonial times.

Beside the law, Gamboa opens the door to another understudied aspect of the Bourbon Reforms: the internal opposition to radical reform from experienced, mostly middle rank officials. By ignoring these voices, it has been easy to categorize the process along the dichotomous lines of reformers and reactionaries, creoles and peninsulars,

colonizers and the colonized, and the enlightened and obscurantists. It has been easy to swallow the propaganda of the top Bourbon ministers themselves, who justified their activism by magnifying the pathologies of Spanish America. Many officials, born in both Europe and America, rejected the harsh diagnosis of America's problems. New Spain, in particular, with its thriving mining sector, growing cities, and expanding haciendas hardly appeared in need of major restructuring.

Most critics of the reforms of Gálvez conceded that Spain had a legitimate claim to increased tax revenues from America after the Seven Years War but believed the goal could be achieved through moderate means. These men, such as Gamboa, Bucareli, and Landázuri, tended to put high value on local knowledge and experience. Many times they explained to Madrid why local customs in New Spain, such as the partido system in the mines or the use of unminted silver in northern New Spain as currency, made practical sense and should not be attacked simply because they offended rules written in Madrid. Reform had to proceed slowly, working with existing institutions, such as the consulado and the Audiencias, and taking into account the peculiarities of the New World. To a certain extent, Gálvez discovered this reality. His protégé José Antonio de Areche, the visitor-general of Peru, learned the lesson too late, after he had ignited an Andean conflagration in the early 1780s with his insensitive implementation of reforms.

One of the most intriguing about-faces in the colonial reform process was made by Antonio de Ulloa, the scientist and naval commander born in 1716. In his youth, in the late 1730s, he accompanied a French-Spanish scientific expedition to South America. Upon his return to Spain, he wrote, with his fellow naval officer Jorge Juan, a harsh condemnation of the corruption of colonial government, the *Noticias secretas*, which

urged far-reaching reforms.<sup>547</sup> He later served in America as the director of the Huancavelica mercury mine in Peru and as the first Spanish governor of Louisiana. By the 1770s, when he led the last fleet to Veracruz, he had come to doubt the wisdom of reform. Ulloa had little faith in Gálvez and considered his intendancy plan dangerous, because it failed to consider something as obvious as the geographic extent of New Spain.<sup>548</sup> The knowledge he acquired of America over his long career and the empathy he developed towards creoles, having married a native of Lima, turned him against the radical reforms of Charles's government. He might be a paradigmatic case: the more Spanish officials came to know America, the more they realized its distinctiveness, the logic of its customs, and the exaggerated tone of most arguments for reform.

Gamboa is a particularly attractive object of study since he cut across so many of the categories historians have used to make sense of the period. He opposed the reform package of Gálvez yet he was no reactionary: he offered an alternative path to increased royal tax revenues that harnessed the autonomous tendencies of the novohispano economy. He was a creole but lavishly patronized by peninsula-born Spaniards, who like him did not feel the need to choose sides between their native and adopted homes. Loyalty to one did not exclude loyalty to the other. He was highly educated and connected to a web, strung out by the Jesuits and the Basques, which transmitted the latest news about physical science, political economy and other Enlightenment concerns. To bestow on the Bourbon reformers the tag "enlightened" but to deny it to opponents

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<sup>547</sup> For a recent English translation of the *Noticias secretas* see Jorge Juan and Antonio de Ulloa, *Discourse and political reflections on the Kingdoms of Peru, their government, special regimen of their inhabitants, and abuses which have been introduced into one and another, with special information on why they grew up and some means to avoid them (Noticias secretas de América)*, TePaske, John J. (Norman, 1978).

<sup>548</sup> Ulloa carried on a frank correspondence with his friend, the viceroy Bucareli, while in New Spain, in which both made clear their opposition to Gálvez. See Solano, *Antonio de Ulloa y la Nueva España : descripción geográfico-física de una parte de la Nueva España de Antonio de Ulloa, y su correspondencia privada con el virrey don Antonio María de Bucareli*, especially 151-153.

like Gamboa reveals the term's lack of analytical bite: it mostly operates teleologically to indicate reforms that eventually triumphed and became part of the modern world.

Using Gamboa as a lens to study eighteenth century Mexico and the Spanish world therefore complicates and nuances our historical understanding. Through Gamboa, the vibrant legal culture of his day is revealed, thereby undermining many old ideas about the ineffectiveness of Spanish law in America. It prompts reflection on the true origins of the shaky legal and institutional environment of today's Latin America. Finally, the career of Gamboa sheds light on the workings of the Spanish imperial administration, a subject that remains surprisingly understudied. We still need to know more about such middle rank figures as the lawyers who staffed the royal courts and bureaucracy and linked local society to the circuits of power in the Spanish empire. The fascinating career of Gamboa suggests the wealth of material on law and lawyers waiting to be uncovered.

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## **Vita**

Christopher Peter Albi was born in Winnipeg, Manitoba on December 12, 1962, the son of Wilfred N. P. Albi and E. Marjorie Albi. He attended high school in Winnipeg at St. John's-Ravenscourt School and attended the University of Manitoba, where he graduated with a Bachelor of Arts (Honours) in 1985. He attended the University of Toronto Faculty of Law, graduating in 1990 with a Bachelor of Laws (LL.B.). After being called to the bar of the Law Society of Upper Canada in 1992, he moved to Mexico, where he was employed for five years in the banking industry. He then worked at Merrill Lynch in New York City from 1998 to 2001 as an equity analyst, covering the Latin American mining industry. He entered the graduate history program at the University of Texas at Austin in 2001, to concentrate on Latin American History.

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